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LOCAL GOVERNMENT LAW

by

Charles L. Babcock* and Bryan C. Collins**

I. ACCESS TO GOVERNMENT INFORMATION

DURING the Survey period a number of important judicial decisions construed the Texas Open Records Act,¹ the Texas Open Meetings Act,² the Federal Freedom of Information Act,³ and the rights of access to government information, which the Texas⁴ and United States Constitutions grant all citizens.⁵ In addition, the Seventieth Session of the Texas

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1. TEX. REV. CIV. STAT. ANN. art. 6252-17a (Vernon Supp. 1988). The policy declaration set forth in § 1 of the Texas Open Records Act provides:

Pursuant to the fundamental philosophy of the American constitutional form of representative government which holds to the principle that government is the servant of the people, and not the master of them, it is hereby declared to be the public policy of the State of Texas that all persons are, unless otherwise expressly provided by law, at all times entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. To that end, the provisions of this Act shall be liberally construed with the view of carrying out the above declaration of public policy.

Id.

2. TEX. REV. CIV. STAT. ANN. art. 6252-17 (Vernon Supp. 1988). Section 2(a) of the Texas Open Meetings Act provides:

Except as otherwise provided in this Act or specifically permitted in the Constitution, every regular, special, or called meeting or session of every governmental body shall be open to the public; and no closed or executive meeting or session of any governmental body for any of the purposes for which closed or executive meetings or sessions hereinafter authorized shall be held unless a quorum of the governmental body has first been convened in open meeting or session for which notice has been given as hereinafter provided and during which open meeting the presiding officer has publicly announced that a closed or executive meeting or session will be held and identified the section or sections under this Act authorizing the holding of such closed or executive session.

Id.

3. 5 U.S.C. § 552a (1982).

4. TEX. CONST. art. 1, § 8. This section provides in part that "prosecutions for the publication of papers, investigating the conduct of officers or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence."
Id.

5. The first amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or

Legislature passed important amendments to the Open Meetings and Open Records Acts.⁶

A federal court, curiously enough, decided the most important case under the Texas Open Records Act during the Survey period. In *Kneeland v. National Collegiate Athletic Association*⁷ three Dallas news organizations (WFAA-TV, The Dallas Times Herald, and The Dallas Morning News) sought records from the National Collegiate Athletic Association (NCAA) and the Southwest Conference (SWC) concerning football recruiting violations of Southwest Conference schools pursuant to the Open Records Act. The NCAA and the SWC refused to release the documents claiming that they were not governmental bodies under the Act and therefore should not be subject to the Act.⁸ The news organizations filed suit in state district court in Travis County, claiming a right to the documents under the Open Records Act⁹ as well as the federal civil rights statute, 42 U.S.C. section 1983. The defendants removed the case to federal court based upon federal question jurisdiction.¹⁰

United States District Court Judge James Nowlin held that the news organizations were not entitled to the documents under their federal cause of action, but ordered the release of a majority of the documents under the Texas Open Records Act.¹¹ In a lengthy opinion, the court held that the Open Records Act applied to the NCAA and the SWC by virtue of section

abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

6. See *infra* notes 175-80 and accompanying text discussing amendments.

7. 650 F. Supp. 1047 (W.D. Tex. 1986).

8. Section 3(a) of the Texas Open Records Act states that "[a]ll information collected, assembled, or maintained by governmental bodies pursuant to law or ordinance or in connection with the transaction of official business is public information and available to the public during normal business hours of any governmental body" TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a) (Vernon Supp. 1988). The Act defines governmental body as meaning:

- (A) any board, commission, department, committee, institution, agency, or office within the executive or legislative branch of the state government, or which is created by either the executive or legislative branch of the state government, and which is under the direction of one or more elected or appointed members;
- (B) the commissioners court of each county and the city council or governing body of each city in the state;
- (C) every deliberative body having rulemaking or quasi-judicial power and classified as a department, agency or political subdivision of a county or city;
- (D) the board of trustees of every school district and every county board of school trustees and county board of education;
- (E) the governing board of every special district;
- (F) the part, section, or portion of every organization, corporation, commission, committee, institution, or agency which is supported in whole or in part by public funds, or which expends public funds, public funds as used herein shall mean funds of the State of Texas or any governmental subdivision thereof;
- (G) the Judiciary is not included within this definition.

Id. § 2(1).

9. The plaintiffs claimed that the NCAA and the SWC were indeed governmental bodies as defined by the Act in § 2(1)(F). See *supra* note 8. The main issue in the determination of whether the defendants were governmental bodies became, therefore, whether they were "supported in whole or in part by public funds, or [whether they] expend[ed] public funds." TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 2(1)(F).

10. 650 F. Supp. at 1050.

11. *Id.* at 1054-55, 1090.

2(1)(F).¹² The court found that public funds from state universities supported both the NCAA and SWC in part and that the organizations spent public funds of the State of Texas.¹³

The Dallas Morning News also sued the private university members of the Southwest Conference,¹⁴ claiming they too were subject to the Texas Open Records Act.¹⁵ The trial court granted summary judgment for the private universities and the Texas court of appeals affirmed the decision.¹⁶ The case currently is pending on a writ application before the Texas Supreme Court.¹⁷

In *Times Herald Printing Co. v. Jones*¹⁸ the Dallas Times Herald sought to unseal the pleadings, judicial orders, and opinions in a civil case. The newspaper alleged that it was entitled to access to the records pursuant to the Texas Constitution or the freedom of the press clause of the first amendment.¹⁹ The trial court refused to release the records.²⁰ On appeal, the Dallas court of appeals assumed that there was a first amendment right of access to judicial pleadings in a civil case, but the court nonetheless affirmed the district court's sealing order because the pleadings contained a settlement agreement between the parties to the suit.²¹ The court relied upon the state's substantial interest in promoting settlements.²²

The Texas Supreme Court granted a writ of error and vacated the lower courts' decisions.²³ The court held that the trial court and the court of appeals had erred in assuming jurisdiction since the newspaper filed its motion to unseal the documents after the trial court had lost plenary power over its judgment.²⁴ Following this decision, the Dallas Morning News published a two-part series which detailed widespread sealing of records at the Dallas County Courthouse.²⁵ In the wake of this article, the Honorable John Marshall, presiding judge of the Dallas district courts, promulgated administra-

12. *Id.* at 1063.

13. *Id.* at 1059-63.

14. The private university members of the Southwest Conference are Southern Methodist University, Texas Christian University, William Marsh Rice University, and Baylor University.

15. *A. H. Belo Corp. v. Southern Methodist Univ.*, 734 S.W.2d 720, 720-21 (Tex. App.—Dallas 1987, application for writ pending).

16. *Id.* at 720.

17. The court of appeals held the private universities not governmental bodies as defined by the Texas Open Records Act since they were neither supported by public funds, nor did they expend public funds. *Id.* at 723.

18. 717 S.W.2d 933 (Tex. App.—Dallas 1986) (en banc), *vacated*, 730 S.W.2d 649 (Tex. 1987) (per curiam).

19. The district court had sealed the records of a settled civil suit (to which the Dallas Times Herald was not a party). The parties in the suit had conditioned their settlement agreement upon the sealing of the records. The Times Herald contended that the sealing order abridged its rights under art. I, § 8 of the Texas Constitution, *see supra* note 4, as well as violated the first amendment to the United States Constitution. *See supra* note 5.

20. 717 S.W.2d at 934.

21. *Id.* at 938, 940.

22. *Id.* at 939-40.

23. 730 S.W.2d 648, 649 (Tex. 1987).

24. *Id.* at 649.

25. The Dallas Morning News, Nov. 22, 23, 1987, at 1, col. 1.

tive rules that substantially curtailed the ability of parties or the court to seal documents.²⁶

The issue of sealed judicial pleadings arose again in *Federal Savings & Loan Insurance Corp. v. Blain*.²⁷ The parties in *Blain* agreed to place the terms of their preliminary injunction under seal. The Federal Savings & Loan Insurance Corporation (FSLIC) subsequently moved to remove the seal. The district court partially granted the FSLIC's motion to unseal,²⁸ and Blain appealed the decision. The Fifth Circuit affirmed the lower court's decision, stating that the district court should exercise its discretionary authority to seal the record of judicial proceedings in a cautious manner.²⁹ The court characterized the area of the sealing of the record of judicial proceedings as a "legal minefield."³⁰ The Fifth Circuit based its affirmation, however, on the fact that the defendant had disclosed the terms of the injunction to a third party.³¹ The defendant, therefore, waived his right to confidentiality, and he could not complain of the district judge's order to unseal the records.³²

The United States Court of Appeals for the Fourth Circuit also decided a record sealing case that dealt with physical access to plea and sentencing hearings in connection with espionage charges against an alien. In *In Re Washington Post Co.*³³ the court held that The Washington Post newspaper had a first amendment right of access to plea and sentencing hearings and to documents filed in connection with the hearings.³⁴ The court of appeals

26. *Id.*

27. 808 F.2d 395 (5th Cir. 1987).

28. *Id.* at 397.

29. *Id.* at 399. The court acknowledged, however, that certain situations warrant the use of the seal and cited *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609 (1978) (broadcasters denied access to White House tapes since first amendment does not grant press a right to information about a trial superior to that of the general public).

30. 808 F.2d at 399. The court exemplified its characterization by citing several cases: *First Amendment Coalition v. Judicial Inquiry & Review Bd.*, 784 F.2d 467, 475-77 (3d Cir. 1986) (en banc) (state procedure limiting public access to judicial disciplinary proceedings not unconstitutional under first amendment); *In re Reports Comm. for Freedom of the Press*, 773 F.2d 1325, 1339 (D.C. Cir. 1985) (postponement of reporters' access to discovery documents in civil suit until after trial did not violate first amendment); *United States v. Hubbard*, 650 F.2d 293, 294, 322-25 (D.C. Cir. 1980) (seal of documents seized during criminal investigation should not have been lifted in absence of substantial showing to justify public access).

31. 808 F.2d at 400.

32. *Id.* The court wrote: "Breach of the seal is akin to pregnancy; there is no such thing as an insignificant amount." *Id.*

33. 807 F.2d 383 (4th Cir. 1986).

34. *Id.* at 390. In its analysis, the court observed that the Supreme Court and the courts of appeals have looked to two factors in determining whether a first amendment right of access extends to a particular kind of hearing:

historical tradition and the function of public access in serving important public purposes. In the first inquiry, the court asks whether the type of proceedings at issue has traditionally been conducted in an open fashion. In the second inquiry, the court asks whether public access to the proceeding would tend to operate as a curb on prosecutorial or judicial misconduct and would further the public's interest in understanding the criminal justice system.

Id. at 389. The court performed an examination of relevant case law and a weighing of historical and functional considerations in reaching its conclusion that the first amendment right of access extended to the hearings involved. *Id.*

found that the district judge had failed to comply with the procedural requirements that the court of appeals had set forth in *In re Knight Publishing Co.*³⁵ First, the district court did not give public notice of the government's closure motions.³⁶ Second, when the Post nonetheless learned of the closure, the district court deprived the press of the opportunity to voice objections to the closed hearings.³⁷ Third, the district court failed to state reasons on the record, including specific findings and a discussion of alternatives to closure of the hearings or sealing of the documents.³⁸

The Texas Legislature provided the most important development in the open meetings area during the Survey period. In 1985, the attorney general ruled that a commissioner's court could bar video cameras from a public meeting held pursuant to the Open Meetings Act.³⁹ The attorney general noted that a 1973 amendment to the Act granted the public the right to record a meeting by "sonic" means.⁴⁰ The attorney general noted, however, that the statute was completely silent regarding the right to videotape meetings. The attorney general held that in the absence of a specific provision permitting the public to videotape its meetings, the commissioner's court could disallow the videotaping of its meetings held pursuant to the Open Meetings Act.⁴¹ The legislature overturned the attorney general's decision and amended the act to provide:

All or any part of the proceedings in any public meeting of any governmental body as defined hereinafter may be recorded by any person in attendance by means of a tape recorder, video camera, or any other means of sonic or visual reproduction.⁴²

During the Survey period the First District of the Houston court of appeals entertained the Open Meetings Act in the employment contract context. In *James v. Houston Independent School District*⁴³ a teacher received notice that the school district was attempting to modify her "continuing contract." The teacher requested a public hearing pursuant to the Open Meetings Act, but the school district never provided her with one. The court of appeals found that the board's actions violated the Open Meetings Act and, therefore, could not be ratified.⁴⁴ Furthermore, the court found that the

35. 743 F.2d 231, 234-35 (4th Cir. 1984).

36. 807 F.2d at 392.

37. *Id.*

38. *Id.* The court strengthened its findings by pointing out that "although the [Supreme] Court has not addressed the question of notice, it has held that a district courts' closure order must be supported by a clear statement of reasons, with specific findings, including a discussion of possible alternatives considered and rejected by the court." *Id.* (citing *Press Enterprise I*, 464 U.S. 501, 510-11 (1984)).

39. Op. Tex. Att'y Gen. No. JM-3512 (1985).

40. Act of April 11, 1973, art. 6252-17, ch. 31, § 2(i), 1973 Tex. Gen. Laws 45, 46 states that "[a]ll or any part of the proceedings in any public meeting of any governmental body as defined hereinabove may be recorded by any person in attendance by means of a tape recorder or any other means of sonic reproduction."

41. Op. Tex. Att'y Gen. No. JM-3512 (1985).

42. Act of June 18, 1987, ch. 549, § 2 (1987). Tex. Sess. Law. Serv. 4412, 4413 (Vernon).

43. 742 S.W.2d 701 (Tex. App.—Houston [1st Dist.] 1987, no writ).

44. *Id.* at 707.

offensive actions were subject to judicial intervention.⁴⁵ The court of appeals determined that the school board's action was invalid and rendered summary judgment in favor of the teacher.⁴⁶

The attorney general of Texas determines the applicability of the Open Records Act to information that it is requested to examine as well as the availability of exemptions under the Act.⁴⁷ In addition, the attorney general issues opinions interpreting the Open Meetings Act. The following discussion summarizes attorney general decisions rendered during the Survey period under the two Acts.

A. *The Open Meetings Act*

JM-595. On behalf of the Dallas Area Rapid Transit Authority (DART), the Honorable Henry Wade, criminal district attorney, asked the attorney general whether the Open Meetings Act authorized DART to discuss, in closed executive session, the written evaluations and recommendations of staff personnel. The writings contained information regarding DART's selection of professional consultants, DART's selection of competitive bidders, and DART's awarding of contracts to professional consultants and competitive bidders. The attorney general first held that meetings of DART's board are subject to the Texas Open Meetings Act.⁴⁸ The DART board suggested that a constitutional executive privilege empowered the board to discuss interagency memoranda in executive sessions. President Nixon prominently raised the issue of executive privilege regarding conversations between high governmental officials, particularly the President of the United States and his immediate advisors.⁴⁹ The attorney general asserted that the issue of whether or not the Texas Constitution provides such a privilege has not been decided.⁵⁰ The claimed privilege, therefore, did not authorize the closing of the meeting of the DART board.⁵¹ The attorney general also rejected the board's contention that since the executive discussions concerned documents exempt from disclosure under section 3(a)(11) of the Open Records Act,

45. *Id.*

46. *Id.*

47. *See* TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 7 (Vernon Supp. 1988).

48. Op. Tex. Att'y Gen. No. JM-595 (1986). The DART Authority acknowledged that its board of directors meetings were subject to the Open Meetings Act. The Act defines meeting as "any deliberation between a quorum of members of a governmental body . . . at which any public business or public policy over which the governmental body has supervision or control is discussed or considered, or at which any formal action is taken" TEX. REV. STAT. ANN. art. 6252-17, § 1(a) (Vernon Supp. 1988). The attorney general defined DART as a "special district" within the meaning of "governmental body" of § 1(c) of the Act. JM-595 at 2.

49. *United States v. Nixon*, 418 U.S. 683, 705 (1974). In *Nixon* the Supreme Court recognized that a constitutionally based privilege protects confidential communications between high government officials. *Id.* at 705-06, 715-16.

50. Op. Tex. Att'y Gen. No. JM-595 at 4 (1986).

51. *Id.* Specifically, in matters regarding discovery proceedings, Texas law treats legislatively created special districts in the same manner as private litigants. *Id.* (citing *Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 300-01 (Tex. 1976); *Texas Dep't of Corrections v. Herring*, 513 S.W.2d 6, 7-9 (Tex. 1974)).

then the exception should be engrafted onto the Open Meetings Act.⁵²

JM-596. The Chairman of the Committee on Natural Resources of the Texas House of Representatives asked the attorney general to determine whether the Texas Open Records Act and the Texas Open Meetings Act govern nonprofit water supply corporations.⁵³ The attorney general noted that sections 15.006, 16.002, and 17.000 of the Water Code require water supply corporations that receive financial assistance from the state to comply with the Open Records and Open Meetings Act.⁵⁴ The attorney general held that the law did not require nonprofit water supply corporations not subject to the referenced water code provisions to comply with the Open Meetings Act or the Open Records Act.⁵⁵ The attorney general noted, however, that the Texas Nonprofit Corporation Act⁵⁶ subjects nonprofit corporations in Texas, such as the water supply corporations, to public inspection of financial records of the corporation.⁵⁷

JM-640. The question in this opinion concerned whether the Open Meetings Act requires the Polygraph Examiners Board to conduct licensing examinations in closed session and whether the Open Records Act embraced the board's questions and examinee's answers.⁵⁸ In addition, the Polygraph Examiners Board requested to determine whether the board could bar examinees from hearing other examinees' questions and answers. After finding that the board is subject to the Open Meetings Act,⁵⁹ the attorney general determined that a board session held solely for the purpose of a licensing examination is not a deliberation or meeting within the meaning of the Act.⁶⁰ The attorney general further held that the board could withhold examination questions that it had not yet given.⁶¹ Finally, the attorney general found that the board, pursuant to its statutory grant of authority, could prevent an examinee from hearing another examinee's questions.⁶²

JM-645. This opinion dealt with whether the Open Meetings Act authorizes individual commissioners of the Texas Public Utilities Commission (PUC) to stay the effect of an order entered by a hearings examiner in a docketed case pending an appeal. The attorney general found that the Open Meetings Act requires a public hearing before the commission can grant such a stay.⁶³

52. *Id.*

53. Op. Tex. Att'y Gen. No. JM-596 (1986).

54. See TEX. WATER CODE ANN. §§ 15.006, 16.002, 17.002 (Vernon Supp. 1988).

55. JM-596 at 2-4.

56. See TEX. REV. CIV. STAT. ANN. arts. 1396-2.23, 2.23A (Vernon 1980).

57. JM-596 at 5-7.

58. Op. Tex. Att'y Gen. No. JM-640 (1987).

59. *Id.* at 1.

60. *Id.* at 2, 3.

61. *Id.* at 3.

62. *Id.*

63. Op. Tex. Att'y Gen. No. JM-645 at 3 (1987). The attorney general stated that § 12 of art. 1446c of the Texas Civil Statutes required the commission to exercise its power to stay interim orders as a body and not as individual commissioners acting independently. *Id.*; see TEX. REV. CIV. STAT. ANN. art. 1446c, § 12 (Vernon Supp. 1988). PUC meetings conducted

The PUC further asked whether the Open Meetings Act permitted it to conduct proceedings involving disputed claims of privilege or confidentiality *in camera*. The attorney general concluded that the commission can conduct an *in camera* examination of documents or hold a closed meeting to decide a claim of privilege in a contested case under the same circumstances that a court can engage in an *in camera* review of allegedly privileged documents.⁶⁴ The attorney general based its decision upon an exception to the Open Meetings Act for contested administrative proceedings.⁶⁵

JM-740. This opinion dealt primarily with the selection of a county auditor in Harris County. The attorney general held that a meeting of the district judges of Harris County for the purpose of selecting a county auditor is not a meeting of a "governmental body" as that term is defined in the Open Meetings Act.⁶⁶ Meetings of this nature, therefore, are not covered by the provisions of the Act.⁶⁷

JM-757. The attorney general held that the Texas Open Records Act does not give members of the public an unlimited right to copy, with their own copying equipment, information that the Open Records Act deems public.⁶⁸ The attorney general held, however, that an agency may only deny a requestor's right to copy information with the requestor's own copying equipment when the request presents doubts regarding safety or efficiency or threatens the unreasonable disruption of the business of the governmental body.⁶⁹ The attorney general concluded that the facts of each request determined whether the particular agency could grant or deny a given request.⁷⁰

JM-794. The attorney general addressed the issue of whether meetings of the board of directors of a health facilities corporation created pursuant to article 1528(j) of the Health Facilities Development Act⁷¹ were subject to the Open Meetings Act. The attorney general held that the corporation did not fall within the definition of a governmental body under the Texas Open Meetings Act.⁷² The corporation, therefore, need not comply with the Act.⁷³

as a body must be conducted in accordance with the Open Meetings Act, and the Open Meetings Act expressly provides that meetings of governmental bodies shall be open to the public. *JM-645* at 2; see TEX. REV. CIV. STAT. ANN. art. 6252-17, § 2(a) (Vernon Supp. 1988).

64. *JM-645* at 4.

65. "[W]e conclude that the contested case procedural requirements in the Administrative Procedure and Texas Register Act, article 6252-13a, V.T.C.S., creates an exception to the Texas Open Meetings Act with regard to contested cases." *Id.*

66. Tex. Att'y Gen. No. *JM-740* (1987).

67. *Id.*

68. Tex. Att'y Gen. Op. *JM-757* (1987).

69. *Id.*

70. *Id.* at 6.

71. TEX. REV. CIV. STAT. ANN. art. 1528 (Vernon 1988).

72. Tex. Att'y Gen. No. *JM-794* (1987).

73. *Id.*

B. Open Records Act

The following attorney general decisions deal exclusively with requests for information under the Texas Open Records Act.

ORD-440. The Austin Police Department received a request for access to records concerning a police department investigation into allegations of sexual abuse of children at the Texas School for the Deaf.⁷⁴ The attorney general held that section 34.08 of the Family Code⁷⁵ provided for the confidentiality of the requested material.⁷⁶ The attorney general further held in the alternative that a common law right of privacy probably excepted the information from disclosure.⁷⁷

ORD-441. The attorney for the Austin Independent School District (AISD) asked the attorney general to determine whether the district should release information concerning AISD personnel who had not informed the school district that they had passed the Texas Examination of Current Administrators and Teachers Test (TECAT).⁷⁸ An attorney for two teachers who were involved in litigation attempting to have TECAT invalidated filed a brief arguing that the information was exempt because of a protective order filed in the teacher litigation. The attorney general disagreed in construing the language of the order.⁷⁹ The attorney general also rejected an argument by the teachers that the release of the information was clearly an unwarranted invasion of personal privacy.⁸⁰

ORD-442. The attorney general held that section 3.06 of the Communicable Disease Prevention and Control Act⁸¹ did not exempt the disclosure of information that the Texas Department of Health collected regarding a shigel-

74. Tex. Att'y Gen. ORD-440 (1986).

75. See TEX. FAM. CODE ANN. § 34.08 (Vernon 1975).

76. ORD-440 at 2; see TEX. REV. CIV. STAT. ANN. art. 6252-17a, §§ 3(a)(1), (a)(3) (Vernon Supp. 1988), which except information determined to be confidential as a matter of law and information relating to litigation, respectively.

77. ORD-440 at 2.

78. Tex. Att'y Gen. ORD-441 (1986).

79. *Id.* at 2.

80. *Id.* The teachers based this argument on TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(2) (Vernon Supp. 1988), which prohibits the release of information in personnel files when such a disclosure would clearly constitute an unjustifiable invasion of personal privacy. In his rebuttal of this argument, the attorney general cited *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.). The *Hubert* case established that § 3(a)(2) only protects personnel file information if the release of the records would create a tort action for invasion of privacy as set forth in *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). 652 S.W.2d at 558. *Industrial Foundation* established that information is deemed confidential by law if "(1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public." 540 S.W.2d at 685. The attorney general found that the public had a legitimate interest in knowing whether or not a teacher possessed the basic skills necessary to pass the TECAT and, therefore, under *Hubert* § 3(a)(2) did not protect the information. ORD-441 at 3. The attorney general asserted that as long as a legitimate public interest existed, the fact that disclosed information was highly intimate or embarrassing was irrelevant. *Id.*

81. TEX. REV. CIV. STAT. ANN. art. 4419b-1, § 3.06 (Vernon Supp. 1988).

lois outbreak.⁸² Section 3(a)(1) of the Open Records Act prohibits the disclosure of information that a statute deems confidential.⁸³ The attorney general stated, however, that section 3.06 of the Communicable Disease Prevention and Control Act does not protect from disclosure those investigative reports that section 3.07 of the Act requires.⁸⁴

ORD-443. The city of Electra requested an opinion from the attorney general concerning whether the city should grant a citizen's request for the city's utility bill ledgers.⁸⁵ The records indicated which customers were delinquent in their accounts. The city maintained that the information was exempt from disclosure on privacy grounds. The attorney general rejected this argument and held that the city had to release the requested information.⁸⁶

ORD-444. The Orange Leader, a local newspaper, requested some personnel file information from the Orange County sheriff's office concerning two employees in the sheriff's office.⁸⁷ The sheriff argued that section 3(a)(2) of the Open Records Act protected this information because the disclosure would involve a clearly unwarranted invasion of personal privacy. The attorney general rejected the sheriff's argument and ordered the sheriff to release the information on the ground that the public has a legitimate interest in information regarding the qualifications and performances of governmental employees.⁸⁸ This assertion is especially true when the information regards employees in sensitive positions, such as members of the sheriff's department.⁸⁹ The newspaper also requested information on disciplinary actions concerning five employees. The sheriff resisted this request, arguing that release of the information would unduly interfere with law enforcement and prosecution.⁹⁰ He also claimed that release of the information would hamper contemplated litigation.⁹¹ The attorney general ordered the sheriff's de-

82. Tex. Att'y Gen. ORD-442 at 3 (1986).

83. See *supra* note 76.

84. ORD-442 at 3.

85. Tex. Att'y Gen. ORD-443 (1986).

86. *Id.* at 4. Citing *Industrial Found. v. Texas Indus. Accident Board*, 540 S.W.2d 668 (Tex. 1976), the attorney general asserted:

[A]nyone who is delinquent in his utility payments to the city of Electra owes a debt to a governmental entity rather than to a private party. Although the public may have no legitimate interest in private debts, we believe it has a genuine interest in knowing who owes money to the city, as this information will enable the public to gain some insight into the manner in which the city handles the task of revenue collection and may spur the public to attempt to influence city officials to perform that task differently.

Id. at 3-4; see *supra* note 80 and accompanying text.

87. Tex. Att'y Gen. ORD-444 (1986).

88. *Id.* at 3.

89. *Id.* In rejecting the § 3(a)(2) argument, the attorney general propounded the same legitimacy argument that he had asserted in ordinances 441 and 443, citing *Hubert v. Harte-Hanks Tex. Newspapers, Inc.* 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e. and *Industrial Found. v. Texas Indus. Accident Bd.* 540 S.W.2d 668 (Tex. 1976). See *supra* notes 80 & 86 and accompanying text.

90. See TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(8) (Vernon Supp. 1988).

91. See *id.* § 3(a)(3).

partment to release the information unless it submitted "compelling" reasons justifying withholding the information within five days.⁹² The Orange Leader also asked for information concerning a shooting incident that the sheriff contended was the subject of a pending criminal case and was, therefore, protected from public disclosure. The attorney general faulted the sheriff for not providing sufficient information to identify the pending criminal case and ordered the sheriff to submit the information within five days.⁹³ Finally, the newspaper requested information regarding reasons for dismissal, promotion, and demotion of sheriff department employees. The attorney general stated that the public has an obviously legitimate interest to know why a public employee is dismissed, demoted, or promoted⁹⁴ and, therefore, found that the sheriff's department should release the information.⁹⁵

ORD-445. The city attorney of Midland inquired whether the Open Records Act requires a governmental body to obtain and disclose information that is collected and maintained by an outside consultant whom the city hired.⁹⁶ The city of Midland had contracted with a consulting firm to study its police department. The firm submitted a final report to the city that the city made public. The city received a request for access to the consultant's notes and work papers. The attorney general held that section 3(a) of the Act⁹⁷ did not subject the information to disclosure because the city never possessed the requested information and did not know the contents of the information requested.⁹⁸ Furthermore, the attorney general distinguished this case from one in which the governmental entity assembled the information and then gave that information to an outside entity in order to circumvent the disclosure requirements of the Act.⁹⁹

ORD-446. The Texas Credit Union Department received a request for a large amount of financial data.¹⁰⁰ The credit union claimed exemption pursuant to section 3a(12) of the Open Records Act.¹⁰¹ The attorney general agreed with the credit union, holding that the section applies to information about the current and projected financial condition and operations of a credit union.¹⁰²

92. ORD-444 at 5; *see* Tex. Att'y Gen. ORD-319 (1982) (governmental body must show compelling reason to withhold information).

93. ORD-444 at 5.

94. *Id.*

95. *Id.* at 6-7.

96. Tex. Att'y Gen. ORD-445 (1986).

97. *See supra* note 8 for the text of this provision of the Open Records Act.

98. ORD-445 at 2.

99. *Id.*

100. Tex. Att'y Gen. ORD-446 (1986).

101. *Id.* at 2. Section 3(a)(12) of the Open Records Act provides:

information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions, and/or securities, as that term is defined in the Texas Securities Act;

TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(12) (Vernon Supp. 1988).

102. ORD-446 at 3; *see* Tex. Att'y Gen. ORD-187 (1978).

ORD-447. This request dealt with materials relating to an investigation of alleged wrongdoing by an employee of the University of Texas Athletic Department. The request sought copies of any reports relating to the employee that the university may have filed with the National Collegiate Athletic Association. The university contended that it should not release any of the requested reports containing information concerning students because of the Family Educational Rights and Privacy Act of 1974,¹⁰³ which the Texas Open Records Act incorporates through section 14(e). The university further contended that the privacy provisions of section 3(a)(1) of the Act protected the information. The attorney general found that section 14(e) of the Act protects from disclosure only those materials "directly related to a student."¹⁰⁴ The attorney general then addressed whether section 3(a)(1) subjected the remaining materials to disclosure. The attorney general prefaced his determinations by noting that section 3(a)(1) contains a constitutional as well as a common law right of privacy. The attorney general held that the constitutional right of privacy only protects information relating to marriage, procreation, contraception, family relationships and the upbringing and education of children.¹⁰⁵ The attorney general asserted, therefore, that information regarding NCAA violations and alleged violations of NCAA rules was not included among the constitutionally protected privacy interests.¹⁰⁶ The attorney general also rejected the common law privacy argument and criticized a prior decision of the attorney general's office, ORD-142.¹⁰⁷

ORD-448. The city of El Paso requested an opinion as to whether it must provide the home address of a public employee to the Child Support Enforcement Bureau of another state. The attorney general found that section 3(a)(17) of the Open Records Act protected the information from disclosure.¹⁰⁸ The attorney general held, however, that the city had properly provided the employee's social security number and verified dates of employment and work address.¹⁰⁹ The city was correct, the attorney general held, in refusing to release the employee's home address under the authority of section 3(a)(17).¹¹⁰

ORD-449. The attorney general advised the chairman of the Unauthorized Practice of Law Committee of the State Bar of Texas regarding whether the Open Records Act subjected the committee's decisions to disclosure. The attorney general noted that the governmental body (in this case the Unau-

103. 20 U.S.C. § 1232g (1982).

104. Tex. Att'y Gen. ORD-447 at 3 (1986).

105. *Id.* at 4.

106. *Id.*

107. *Id.* at 6-7. In Tex. Att'y Gen. ORD-142 (1976) the attorney general found a common law right of privacy existed that prevented the disclosure of minutes of a University of Texas Southwest Athletic Conference meeting at which certain individuals had been reprimanded and censured for violating Southwest Conference regulations. *Id.* at 4.

108. Tex. Att'y Gen. ORD-448 at 4 (1986).

109. *Id.*

110. *Id.*

thorized Practice of Law Committee of the State Bar) had not asked for a decision pursuant to the provisions of the Act. The attorney general held that in the absence of such a request it had no jurisdiction to decide the question.¹¹¹

ORD-450. The Huntsville Independent School District requested a decision concerning whether a school district must release notes taken by an appraiser during an evaluation of instructional personnel. The attorney general first noted that the Act governed the requested information, but that most of the materials consisted of advice, opinions, and recommendations and were, therefore, excepted from disclosure under section 3(a)(11) of the Act.¹¹² The attorney general held, however, that the section 3(a)(11) exemption would not apply if the information consisted merely of objective observations of facts and events.¹¹³

ORD-451. An attorney asked the Texas State Board of Public Accountancy to release information pertaining to his client, a certified public accountant against whom a complaint was pending. The state board argued that the information had been assembled in anticipation of litigation, and therefore section 3(a)(3) of the Open Records Act exempted it from disclosure. The attorney general found, however, that article 41a-1, section 25 required that the records be released.¹¹⁴ Since the licensee authorized a designated person, his attorney, to inspect the information, the board could not withhold the information under section 25.¹¹⁵

ORD-452. Parents of children in the Houston Independent School District (HISD) asked for documents relating to the location of recently repainted school desks and chairs. The parents sought the information because they were concerned that the HISD had repainted certain desks with leaded paint, a violation of federal law. The district prepared one of the documents upon the parents' request and the custodian claimed that this document was, therefore, not subject to disclosure. The attorney general agreed.¹¹⁶ With regard to the remaining documents, however, the attorney general held that because of the potential violation of federal law and various threats of litigation, section 3(a)(3) of the Act exempted all of the remaining documents from the public.¹¹⁷

ORD-453. This request dealt with whether the General Land Office could withhold the identity of those individuals who received bid packets for the offer of real estate controlled by the Texas Board of Corrections. The land

111. Tex. Att'y Gen. ORD-449 at 2 (1986).

112. Tex. Att'y Gen. ORD-450 at 4 (1986).

113. *Id.*

114. Tex. Att'y Gen. ORD-451 at 3 (1986); see TEX. REV. CIV. STAT. ANN. art. 41a-1, § 25 (Vernon Supp. 1988).

115. ORD-451 at 3.

116. Tex. Att'y Gen. ORD-452 at 3 (1986).

117. *Id.* at 6.

office requested an attorney general opinion as to whether the section 3(a)(4) exception under the Open Records Act, dealing with information that would give advantage to competitors or bidders, applied.¹¹⁸ The land office relied heavily upon the attorney general opinion MW-591, but the attorney general rejected that decision and held that MW-591 must be limited to its particular facts.¹¹⁹ The attorney general also noted that the section 3(a)(4) exception is to be construed narrowly and, therefore, ordered the land office to release the information.¹²⁰

ORD-454. The Dallas city attorney requested an opinion as to whether the family of the victim that a policeman fatally shot may gain access to the police department's investigative report regarding the shooting after the police department selectively disclosed the report to the police officer who shot the victim. The attorney general held that the Open Records Act section 3(a)(3) exception embraced the report and, therefore, protected it from disclosure.¹²¹ Since the city had a legal duty to release the report to the police officer, the city had, therefore, not waived the section 3(a)(3) protection.¹²² The attorney general qualified his opinion on the fact that the victim's family had not shown a real likelihood of litigation over the shooting.¹²³

ORD-455. A number of governmental bodies asked the attorney general to construe certain of the Sixty-ninth Legislature's amendments to the Open Records Act. Pursuant to these amendments, section 3(a)(17) excepted from public disclosure the home addresses and home telephone numbers of each official and employee of a governmental body except as section 3(a) otherwise provides. Section 3(a) provides that governmental employees and officials should choose whether or not to allow public access to the information in the custody of the governmental body relating to the officials' or the employees' home addresses and home telephone numbers. The requesting governmental bodies asked the attorney general to state whether the provisions applied to former governmental employees who, while still employed, elected not to disclose the information. In addition, the governmental bodies asked the attorney general whether section 3(a) protected applicants for government employ.

The attorney general found that the legislature did not contemplate applicants for employment as being within the scope of the amendments.¹²⁴ As to former employees, the attorney general found that the protection of the statute does not cease when the employment relationship ends. The attorney general then addressed the issue of whether section 3(a)(1) of the Act dealing

118. Tex. Att'y Gen. ORD-453 (1986).

119. *Id.* at 3.

120. *Id.* at 4. Section 14(d) of the Open Records Act states that its provisions are to be "liberally construed in favor of the granting of any request for information." TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 14(d) (Vernon Supp. 1988).

121. Tex. Att'y Gen. ORD-454 at 7 (1986).

122. *Id.* at 2-4.

123. *Id.*

124. Tex. Att'y Gen. ORD-455 at 2 (1987).

with personal privacy excepted certain personnel information from disclosure. The attorney general found that the Act allows the public to access the following types of personal information concerning government employees: educational training, names and addresses of former employers, dates of employment, the kind of work, salary per month, reasons for leaving, the names, occupations, addresses, and telephone numbers of character references, job preferences or abilities, and the names of friends or relatives who are employed by the government.¹²⁵ The attorney general found that information regarding a governmental employee's illnesses, operations within the past year, and physical handicaps is intimate personal information that section 3(a)(1) exempts from disclosure.¹²⁶ Finally, the attorney general found that applicants for government jobs could not expect a governmental body to withhold their birthdates, height, weight, marital status, or social security numbers.¹²⁷

ORD-456. The police chief of the city of Houston requested an opinion as to the availability of forms relating to businesses that employ off-duty police officers. The forms contained information regarding businesses that felt they needed extra security and had, therefore, hired off-duty police officers. The forms specified the location, type, and reputation of specific businesses. Furthermore, the forms specified whether the officer wears his or her uniform while on the job. The police department claimed exception under section 3(a)(3) of the Open Records Act, which deals with the release of information that interferes with the enforcement of the law and the prevention of crime. The police department claimed that the forms would indicate which businesses were not protected by extra police personnel and, therefore, had independent significance to law enforcement activities. The attorney general agreed that the section 3a(8) exception protected the information.¹²⁸

ORD-457. This request dealt with whether the name of the arresting officer on an expunged arrest report is excepted from disclosure. The attorney general found that the information was excepted from disclosure under article 55.03 of the Code of Criminal Procedure dealing with expunged records.¹²⁹ Article 55.03 prohibits the release, dissemination, or use of oppugned records subsequent to an entry of expunction order.

ORD-458. A requestor asked the Texas State Board of Medical Examiners to release information regarding complaints against licensees. The attorney general noted that the request did not seek information about actual complaints, but rather statistical information *concerning* complaints that did not reveal the identity of the subjects of the complaints.¹³⁰ Although article

125. *Id.* at 8.

126. *Id.* at 9.

127. *Id.*

128. Tex. Att'y Gen. ORD-456 at 3 (1987).

129. Tex. Att'y Gen. ORD-457 at 1-2 (1987); see TEX. CODE CRIM. PROC. ANN. art. 55.03, § (1) (Vernon Supp. 1988).

130. Tex. Att'y Gen. ORD-458 at 3 (1987).

4495b, section 4.05(d) of the Medical Practices Act protects information about actual complaints, it is silent on whether statistical information can be revealed.¹³¹ The attorney general held that section 4.05(d) did not apply to the statistical information since the intent of the confidentiality provisions is to protect the identities of licensees who have complaints filed against them.¹³²

ORD-459. The Midland city attorney asked whether the Open Records Act required him to release to the public letters that he had sent to the attorney general requesting a decision under the Open Records Act.¹³³ The attorney general noted that it had never officially addressed the issue of how the Open Records Act applies to request letters from governmental bodies.¹³⁴ The attorney general pointed out, however, that his office's practice had been to make such letters generally available to the public.¹³⁵ The attorney general held that letters from governmental bodies requesting open records decisions or arguing in support of the withholding of information under the Act are a public record.¹³⁶ In order to ensure protection of information which is itself the subject of the request or which raises a privacy issue, the attorney general advised governmental bodies to submit that information in a separate document accompanying their request letters.¹³⁷

ORD-460. The city of Laredo received a request for the city manager's proposed budget for a sewer fund. The city attorney claimed an exception under section 3(a)(6) of the Open Records Act, which exempts drafts and working papers used in the preparation of proposed legislation, and section 3(a)(11) of the Act, which exempts advice, opinion, and recommendations concerning policy matters as an attempt to promote open discussion among the entities' decision makers. Since the proposed budget in this instance was merely a draft of legislation until the city council adopted it, the attorney general held that the section 3(a)(6) exemption applied and did not address the section 3(a)(11) issue.¹³⁸

ORD-461. The El Paso Consultation Association, which worked with the El Paso Independent School District on employee consultations, inquired whether the Open Records Act required it to publicize a tape recording of one of its monthly meetings.¹³⁹ The attorney general held that the Open

131. See TEX. REV. CIV. STAT. ANN. art. 449-56, § 4.05(d) (Vernon Supp. 1988).

132. Tex. Att'y Gen. ORD-458 at 3.

133. Tex. Att'y Gen. ORD-459 (1987). TEX. REV. CIV. STAT. ANN. art. 6252-17(a), § 6(15) (Vernon Supp. 1988) provides that "information currently regarded by agency policy as open to the public" is public information.

134. ORD-459 at 1.

135. *Id.*

136. *Id.* at 2.

137. *Id.*

138. Tex. Att'y Gen. ORD-460 at 3 (1987).

139. Tex. Att'y Gen. ORD-461 (1987). The attorney general found that the tape was a "developed material" per § 2(2) of the Act that contained official subject district business. *Id.*

Records Act applies to tape recordings¹⁴⁰ and that the consultation association was a governmental body within the meaning of the Act because the members of the association were school district employees.¹⁴¹ According to the attorney general, the association's obligation to release the tape turned on whether its meeting was open to the public.¹⁴² The attorney general held that if it was open to the public, the tape must be released.¹⁴³

ORD-462. This lengthy opinion dealt with whether the Act subjects to disclosure records prepared by a law firm employed by the University of Houston to investigate the school's football program.¹⁴⁴ The university contended that the law firm was not a governmental body within the meaning of the Act and, therefore, the Act was inapplicable. The attorney general rejected the school's contention, however, finding that the information was collected by someone acting on behalf of a governmental body.¹⁴⁵ The attorney general established a three-part test for determining whether the attorneys were subject to the Act. First the information gathered by the consultant must relate to the governmental body's official business.¹⁴⁶ Second, the consultant must have acted as the governmental body's agent when gathering the information.¹⁴⁷ Third, the governmental body must have access to the information.¹⁴⁸ With certain exceptions, the attorney general ordered the documents to be released.¹⁴⁹

ORD-463. The state treasurer asked the attorney general to determine whether the Act excepts from disclosure inventories of the contents of safety deposit boxes subject to escheat by the state treasurer.¹⁵⁰ The state treasurer argued that the information would give a competitive advantage to claimants of unclaimed property. The attorney general held that the section 3(a)(4) exception does not protect a governmental body's competitive advantage because a governmental body cannot be in competition with private enterprise.¹⁵¹ The attorney general ordered release of the documents.¹⁵²

ORD-464. The attorney general held that section 3(a)(2) does not protect from public disclosure evaluations of public university administrators made by university faculty members unless the evaluations are highly intimate, embarrassing, and of no legitimate interest to the public.¹⁵³ The attorney general ruled that the public has an interest in the manner in which public

140. *Id.* at 3.

141. *Id.*

142. *Id.* at 5.

143. *Id.*

144. Tex. Att'y Gen. ORD-462 at 7 (1987).

145. *Id.*

146. *Id.* at 4.

147. *Id.*

148. *Id.*

149. *Id.* at 9-18.

150. Tex. Att'y Gen. ORD-463 (1987).

151. *Id.* at 2.

152. *Id.*

153. Tex. Att'y Gen. ORD-464 (1987).

university administrators perform their official duties.¹⁵⁴ In addition, the attorney general held that section 3(a)(11) requires governmental bodies to disclose anonymous evaluations consisting of statements requiring a standardized response.¹⁵⁵ According to the attorney general, section 3(a)(11) does not protect such information from disclosure.¹⁵⁶

ORD-465. The Texas Department of Public Safety inquired whether the Open Records Act required it to release copies of form letters notifying people to appear for drivers' license suspension hearings.¹⁵⁷ The attorney general held that the letters were public information.¹⁵⁸

ORD-466: Texas A&M requested an opinion as to whether section 3a(11) of the Open Records Act exempted from disclosure the university's letters concerning the granting of tenure to a probationary faculty member. The attorney general permitted the university to withhold letters of recommendation submitted by faculty at other universities about a probationary faculty member at Texas A&M, evaluations from the faculty member's supervisors at Texas A&M, a narrative summary and an evaluation of the letters of recommendation and the evaluations, "tenure and promotion, worksheets and two tenure committee reports."¹⁵⁹ The attorney general required the university, however, to release that portion of the documents that was severable factual information.¹⁶⁰

ORD-467. In this opinion the attorney general addressed the availability under the Open Records Act of college transcripts of all school teachers and administrators who had taken six or more semester hours since 1975. The attorney general held that the Open Records Act does not protect from disclosure college transcripts and school district personnel files of those teachers whom the school district employs. According to the attorney general, school districts must release such records to the proper authorities.¹⁶¹

ORD-468. In this opinion the attorney general addressed the issue of whether the city of Houston personnel department must release its files concerning an individual's service as a city of Houston police officer from 1945 to 1964. The city sought to withhold evaluations of the officer's performance and information regarding allegations of the officer's misconduct. The attorney general held that the Open Records Act applies to information that governmental bodies compiled before the effective date of the Act. The attorney general did outline in his opinion, however, certain types of information that the Act does not exempt from disclosure.¹⁶²

154. *Id.*

155. *Id.*

156. *Id.*

157. Tex. Att'y Gen. ORD-465 (1987).

158. *Id.*

159. Tex. Att'y Gen. ORD-466 (1987).

160. *Id.*

161. Tex. Att'y Gen. ORD-467 (1987).

162. Tex. Att'y Gen. ORD-468 (1987).

ORD-469. In this opinion the attorney general resolved whether the Open Records Act protects documents concerning the athletic department of the University of Texas. The University had previously turned over the documents in question to the Travis County district attorney in connection with its on-going investigation into the university's activities. The attorney general found that the Act's litigation exception did indeed protect the documents from disclosure.¹⁶³

ORD-470. In this opinion the attorney general ruled on whether the Austin Independent School District had to comply with a request for information regarding the job performance of the principal of Crockett High School. The attorney general found that the school district could, within its discretion, release a major portion of the information although it was not required to do so.¹⁶⁴

ORD-471. In this opinion the attorney general dealt with the availability of Teacher Retirement System's records containing information such as the teacher's last known employer, salary, position, experience, tenure, education, home address, and home telephone number. The attorney general held that such innocuous information did not fall under the Open Records Act's exception for information involving a clearly unwarranted invasion of personal privacy and, therefore, should be released.¹⁶⁵

ORD-472. In this opinion the attorney general addressed whether the Open Records Act requires the Texas Department of Health to release department investigation reports regarding the department's investigation of particular complaints made against public entities. The attorney general held that the information was protected as trade secrets and should, therefore, not be released.¹⁶⁶

ORD-473. In this opinion the attorney general ruled on the Galveston city attorney's failure to promptly request an Open Records Act opinion after receiving a request for copies of performance appraisals of employees whom the Galveston city council had appointed. The attorney general ordered the city attorney to release the information in part because the city of Galveston did not request the opinion until more than ten days had passed after receiving the request. The attorney general also held that in these instances the city must show a compelling interest to overcome the Open Records Act's presumption that the information is public.¹⁶⁷

ORD-474. In this opinion the attorney general addressed the availability of the Texas State Board of Pharmacy's documents and correspondence containing allegations of misconduct against a licensed pharmacy and its

163. Tex. Att'y Gen. ORD-469 (1987).

164. Tex. Att'y Gen. ORD-470 (1987).

165. Tex. Att'y Gen. ORD-471 (1987).

166. Tex. Att'y Gen. ORD-472 (1987).

167. Tex. Att'y Gen. ORD-473 (1987).

owner/pharmacist. The attorney general held that the pharmacy board investigative files are exempted from disclosure under article 4542a-1, section 17(q) of the Act. The attorney general went on to hold, however, that documents that the board sent to the pharmacist stating the nature of the complaint and informing him that the board was considering disciplinary action against him are not within the exception.¹⁶⁸

ORD-475. In this opinion the attorney general considered the availability of the Capital Metropolitan Transportation Authority's list of persons, including their names, addresses, and telephone numbers, certified to be served by the special transit system. The special transit system is available for persons with disabilities that prevent them from using regular transit. The attorney general held that the Open Records Act did not exempt from disclosure the names, addresses, and telephone numbers of applicants to the Capital Metropolitan Transportation Authority for special transit systems. The attorney general also ruled that no common law right of privacy protected the information.¹⁶⁹

ORD-476. In this opinion the attorney general ruled on whether the Open Records Act required the Texas Employment Commission to release the names of employers or employees who filed unemployment benefit appeals. The attorney general found that the Act's section 3a(1) exception applied because federal regulations prohibit the Texas Employment Commission from revealing the information.¹⁷⁰

ORD-477. In this opinion the attorney general addressed whether the Open Records Act requires the University of Texas, Texas A&M, and Texas Tech to disclose the names of students whose degrees had been rescinded or surrendered. The attorney general held that the Family Education and Rights of Privacy Act prohibits an educational institution from disclosing the identities of persons whose degrees the institution had rescinded because of events that occurred while those persons were students. The attorney general was unable to reach a conclusion as to whether the Act protects the identities of students who voluntarily surrendered their degrees because the request did not contain sufficient factual information.¹⁷¹

ORD-478. In this opinion the attorney general considered whether the Open Records Act requires the Texas Department of Public Safety to disclose either information regarding the department's use of intoxilizer cards or the logs that the department maintained. The attorney general held that the department could withhold the information under the Act's law enforcement exception, section 3a(8). The attorney general ruled, however, that the Act protects the intoxilizer results relating to closed cases and, therefore, the

168. Tex. Att'y Gen. ORD-474 (1987).

169. Tex. Att'y Gen. ORD-475 (1987).

170. Tex. Att'y Gen. ORD-476 (1987).

171. Tex. Att'y Gen. ORD-477 (1987).

department should withhold such information. Furthermore, the attorney general ordered the department to release intoxilizer test results from the subjects of those tests when the subjects themselves requested the results.¹⁷²

ORD-479. In this opinion the attorney general discussed whether the Open Records Act protected copies of documents relating to Texaco's hydrological work performed at its Headless Gas Processing Plant. Texaco had marked the documents "confidential" and voluntarily submitted them to the Texas Water Commission. The attorney general held that the information was not confidential under the Open Records Act simply because Texaco requested the water commission to keep the information confidential.

The attorney general notably rejected the notion that the voluntary nature of Texaco's submission removed the documents from the scope of the Open Records Act.¹⁷³ The attorney general found that under section 3a(13), geological information that applicants file in connection with applications or proceedings before a governmental agency is *not* protected from required public disclosure. The attorney general ultimately, however, found that the water commission could withhold the documents under section 3a(13) because Texaco did not file them with the Texas Water Commission in connection with an application or proceeding before the commission.

ORD-480. In this opinion the attorney general ruled on whether, under the Open Records Act, the Texas Guaranteed Student Loan Corporation (TGS LC) must disclose the names of students who have received and defaulted on loans guaranteed by the TGS LC.¹⁷⁴ The attorney general held that the TGS LC is not an educational agency or institution that the Family Educational Rights and Privacy Act of 1974 protects. Consequently, the attorney general held that the TGS LC should release the information.

C. Amendments to the Texas Open Records and Open Meetings Acts

The 70th Legislature made certain amendments to the Open Records and Open Meetings Act. One of the most significant amendments to the Open Records Act exempts from disclosure photographs that depict a peace officer or a security officer, the release of which would endanger the life or physical safety of the officer, unless the officer is under indictment, charged with an offense, a party in a fire or a police civil service hearing or case in arbitration, or the photograph is introduced as evidence in a judicial proceeding.¹⁷⁵ The 70th Legislature also exempted from disclosure certain rare books, original manuscripts, oral history interviews, personal papers, unpublished letters and organizational records of nongovernmental entities.¹⁷⁶ The legislature also added an exemption for curriculum objectives and test items developed

172. Tex. Att'y Gen. ORD-478 (1987).

173. Tex. Att'y Gen. ORD-479 (1987).

174. Tex. Att'y Gen. ORD-480 (1987).

175. Act of June 11, 1987, ch. 341, § 1, 1987 Tex. Sess. Law Serv. 3484, 3485 (Vernon).

176. *Id.*

by educational institutions that are funded wholly, or in part, by state revenues.¹⁷⁷ The legislature also added section 4A to the Act, which provides that a person requesting public information must complete the examination of the information within ten days after the date the custodian, of the information makes it available.¹⁷⁸ The requesting party may, pursuant to the Act, request an extension of time from the custodian, and the Act now requires the custodian to extend the time for an additional ten days.

The most important of the 70th Legislature's changes to the Open Meetings Act is the amendment to provide for the video recording of meetings subject to the Act. In addition, the legislature amended the Open Meetings Act to provide in section 2A that for each of its meetings that is closed to the public, a governmental body must keep a certified agenda of its proceedings or may make a tape recording of the proceedings, which must include the presiding officer's announcement at the beginning and at the end of the meeting indicating the date and time.¹⁷⁹ The governmental body must make the certified agenda or tape available for *in camera* inspection by the judge of a district court if litigation rises involving the governmental body's alleged violation of the Act. In addition, a governmental body is now required either to prepare and retain minutes or to make a tape recording of each of its open meetings pursuant to section 3B of the Act.¹⁸⁰

II. ANNEXATION

In *Central Education Agency v. Upshire County's Commissioners Court*¹⁸¹ the Texas Supreme Court reviewed a county commissioners court order detaching territory from one school district and annexing it to another. In July of 1983, the Upshire County commissioners court was presented with a detachment and annexation petition signed by a majority of the qualified voters in a territory contiguous to Gilmer Independent School District (Gilmer ISD).¹⁸² The county commissioners court, sitting as a county board of education, detached the territory from the Union Grove Independent School District (Union Grove ISD) and annexed it to Gilmer ISD. The Union Grove ISD appealed to the commissioner of education, who reversed the order based upon its finding that the petitioners were motivated by the desire to escape Union Grove's higher tax rate.¹⁸³ The education commissioner also found that the annexation would be unsound as a matter of educational policy, and the state board affirmed. The petitioners sought judicial review of the state board's action, and the trial court affirmed the state board, concluding that the education commissioner and state board were not limited in their review of the county commissioners court order to merely determine

177. *Id.*

178. Act of June 20, 1987, ch. 964, § 2, 1987 Tex. Sess. Law. Serv. 6593, 6594 (Vernon).

179. Act of June 18, 1987, ch. 549, § 3, 1987 Tex. Sess. Law Serv. 4412, 4414 (Vernon).

180. *Id.* at 4416.

181. 731 S.W.2d 559 (Tex. 1987).

182. *Id.* at 560.

183. *Id.*

whether the petitioner satisfied statutory criteria for detachment.¹⁸⁴

The court of appeals reversed and held that the education commissioner and state board had exceeded their statutory authority. The court of appeals also held that the county commissioners were without authority to exercise any discretion beyond determining whether the statutory criteria for detachment and annexation had been met.¹⁸⁵ Although affirming the court of appeals, the Texas Supreme Court disagreed with the lower court's reasoning as to the discretion which the county commissioners could exercise in detachment and annexation proceedings.¹⁸⁶

The Texas Supreme Court wrote that the Texas Education Code "does not create an automatic entitlement to detachment and annexation once the statutory requirements are met, but merely provides the county commissioners with the authority to do so and states that they 'may' pass an order transferring the territory."¹⁸⁷ The critical issue to the appeal, according to the supreme court, was what type of review the education commissioner could exercise over the decision of the county officials.¹⁸⁸ The commissioner of education contended that he had broad discretion to conduct a de novo review of the county commissioners' detachment and annexation decisions and to consider factors other than the statutory criteria. The supreme court rejected this interpretation of the statute, holding that "[in] hearing appeals from county officials' detachment and annexation decisions, the Commissioner is not to decide the issue or to substitute his own judgment for that of the county officials."¹⁸⁹

The decision, according to the supreme court, of whether to transfer school district territory is discretionary with county commissioners subject to the minimum requirements of section 19.261.¹⁹⁰ The only type of de novo hearing authorized before the education commissioner, according to the court, is one "solely for the purpose of determining whether there was fraud, bad faith or an abuse of discretion in the decision of the County Commissioners and whether their decision is supported by substantial evidence."¹⁹¹ The decision was a narrow one as four judges dissented.

III. ELECTIONS

In *Stevens v. McClure*¹⁹² a district judge voided an election for a county justice of the peace. The court of appeals dismissed the appeal for want of jurisdiction when the appellant failed to timely file a bond, deposit cash, or file an affidavit of inability to pay or secure costs. The appellant took the position that the Election Code¹⁹³ eliminated the requirement of a bond in

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 561.

189. *Id.*

190. *Id.*

191. *Id.* at 562.

192. 732 S.W.2d 115 (Tex. App.—Amarillo 1987, no writ).

193. See TEX. ELEC. CODE ANN. § 233.003(d) (Vernon 1986).

an election contest. The Amarillo court of appeals rejected this position.¹⁹⁴

Subsequently, the winner of the voided election instituted a mandamus action, *Stevens v. Cane*,¹⁹⁵ seeking to determine whether the district court was empowered to declare that the justice of the peace office was vacant. The Amarillo court of appeals denied the writ on the basis that the district court had not declared that the office of the justice of the peace was vacant and that, in any event, no vacancy existed.¹⁹⁶

*Kelly v. Scott*¹⁹⁷ involved an election contest, the outcome of which was contingent on a late absentee ballot. The plaintiff initially won the contest, but following a recount the decision was reversed by a vote of 191 to 190. The trial court upheld the election finding that no illegal votes were counted.¹⁹⁸ The El Paso court of appeals reversed and remanded, however, finding that a single late absentee ballot was void.¹⁹⁹

The late absentee voter in question was hospitalized the night before the election.²⁰⁰ The town clerk went to the hospital and remained outside the room while the voter cast her ballot. The record did not disclose for whom she voted, and no certificate accompanied the application for the late absentee ballot. Texas Election Code section 102.002²⁰¹ provides that a later absentee ballot must be accompanied by a certificate of a licensed physician, chiropractor, or accredited Christian Science practitioner. The question on appeal was whether this provision was mandatory or discretionary. The court found the provision mandatory and invalidated the vote and the election.²⁰²

*League of the United Latin American Citizens Council, No. 4386 v. Midland Independent School District*²⁰³ was a federal court action in which black and Mexican American citizens alleged that the school district's at-large system diluted their voting power in an election for the school district's board of trustees. The trial court ordered the district to divide into seven single member districts and the United States Court of Appeals for the Fifth Circuit upheld the decision over the dissent of Judge Patrick Higginbotham.²⁰⁴ The appeal centered on whether black and hispanic voters were a cohesive voting unit. The majority found that they were, but Judge Higginbotham argued that the district court finding that blacks and hispanics were a single politically cohesive minority under *Thornburg v. Gingles*²⁰⁵ was clearly erroneous.²⁰⁶

194. 732 S.W.2d at 117.

195. 735 S.W.2d 694 (Tex. App.—Amarillo 1987, no writ).

196. *Id.* at 695-96.

197. 733 S.W.2d 312 (Tex. App.—El Paso 1987, writ dismissed).

198. *Id.* at 313.

199. *Id.* at 314.

200. *Id.* at 313.

201. See TEX. ELEC. CODE ANN. § 102.002 (Vernon 1986).

202. 733 S.W.2d at 313-14.

203. 812 F.2d 1494 (5th Cir. 1987).

204. *Id.* at 1503.

205. 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986).

206. 812 F.2d at 1503.

*Martinez v. Slagle*²⁰⁷ was a mandamus proceeding against the presiding officer of the state democratic executive committee. The plaintiff sought to compel Slagle to canvass the results of the initial recall conducted in a democratic primary run-off election for the nomination to the office of judge of the 293rd judicial district court. The writ also sought to compel Slagle to reject the recount petition that the election's losing opponent submitted. The initial recount showed that Judge Martinez had won the run-off election, although a second recount proved the opposite. The San Antonio court of appeals held that the Election Code neither contemplates or permits a second recount and granted the writ.²⁰⁸

In *Moore v. Barr*²⁰⁹ an unsuccessful candidate for his party's nomination for county commissioner filed suit contesting the results of the primary. The trial court ruled against the candidate, and he appealed. The court of appeals dismissed the appeal on the ground that when absentee balloting for general election had begun, the issue was moot.²¹⁰

*Gandara v. Carrasco*²¹¹ was another suit in which an unsuccessful candidate sought to challenge the results of the school board election. The trial court dismissed the case for failure to serve the proper party. The decision was reversed on appeal, with the El Paso court of appeals holding that the successful candidate for the position was the proper person to serve to invoke the court's jurisdiction.²¹²

IV. TORT LIABILITY

The current Survey period includes a number of decisions in which courts assessed both the validity of claims for damages resulting from governmental conduct and the propriety and scope of governmental immunity.²¹³ This section addresses decisions of courts considering the notice requirements for claims against municipalities and governmental entities, the Texas Tort Claims Act,²¹⁴ and the federal cause of action for deprivation of civil rights.²¹⁵

A. Notice Requirements

The Texas Legislature authorized home rule cities to adopt rules governing their liability for damages for injuries to persons or property.²¹⁶ Pursuant to this authority, many cities impose notice requirements upon claimants suing municipalities for proprietary torts.²¹⁷ Failure to observe

207. 717 S.W.2d 709 (Tex. App.—San Antonio 1986, no writ).

208. *Id.* at 711.

209. 718 S.W.2d 925 (Tex. App.—Houston [14th Dist.] 1986, no writ).

210. *Id.* at 926-27.

211. 718 S.W.2d 64 (Tex. App.—San Antonio 1986, no writ).

212. *Id.* at 65.

213. For an outline of the scope of Texas governmental immunity, see Babcock & Collins, *Local Government Law, Annual Survey of Texas Law*, 35 Sw. L.J. 409, 452 (1981).

214. TEX. CIV. PRAC. & REM. CODE §§ 101.001-109 (Vernon 1986 & Supp. 1988).

215. 42 U.S.C. § 1983 (1981).

216. TEX. REV. CIV. STAT. ANN. art. 1175, § 6 (Vernon 1963).

217. TEX. CIV. PRAC. & REM. CODE § 101.101 (Vernon 1986).

notice requirements may foreclose any recovery.²¹⁸ In *Borne v. City of Garland*,²¹⁹ however, the Dallas court of appeals held that a thirty-day notice provision in the Garland City Charter violated the open courts provision of the Texas Constitution.²²⁰ In the trial court, the city obtained summary judgment because the plaintiff failed to provide written notice of his claim for personal injuries within thirty days as the city charter requires. The appellate court used a balancing test set out in *Sax v. Votteler*²²¹ in order to determine whether the thirty-day notice requirement violated the open courts provision. Noting that the notice provision did not contain any exception such as "good cause" or "actual notice," the court concluded that the plaintiff's constitutionally-guaranteed right of redress outweighed the legislative basis for the notice requirement.²²² The court stated that the thirty-day period serves only as a hindrance to plaintiffs' recovery for wrongs done by government entities.²²³ The court also relied upon two decisions invalidating similar notice requirements of greater duration.²²⁴ The concurring opinion, although recognizing that the Texas Supreme Court has not yet addressed the applicability of an exception to notice requirements under the Texas Tort Claims Act for cases in which the city has actual notice of the injury or damage,²²⁵ concluded that a superintendent's report of the accident raised a fact issue of "actual notice" to the city, thus precluding summary judgment.²²⁶

Another court of appeals decision considering the actual notice exception during the Survey period was *Hill v. Bellville General Hospital*.²²⁷ In *Hill* the defendant, a "governmental entity" within the meaning of the Texas Tort Claims Act, obtained a summary judgment in a negligence action because the plaintiffs failed to provide the hospital with notice of their claim within six months of the occurrence, as required by the Texas Tort Claims Act.²²⁸ The court of appeals noted that the hospital investigated the incident and did not dispute that it knew the time, manner, and place of the

218. *LaBove v. City of Groves*, 602 S.W.2d 395, 397 (Tex. Civ. App.—Beaumont) (advisory letter to city that did not conform to notice requirements did not constitute notice), *writ ref'd n.r.e. per curiam*, 608 S.W.2d 162 (Tex. 1980); *Bowling v. City of Port Arthur*, 522 S.W.2d 270, 273 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.) (filing notice with city manager instead of city commission as required did not constitute notice).

219. 718 S.W.2d 22 (Tex. App.—Dallas 1986, no writ).

220. *Id.* at 25. The open courts provision of the Texas Constitution is TEX. CONST. art. I, § 13.

221. 648 S.W.2d 661, 665-66 (Tex. 1983).

222. 718 S.W.2d at 24.

223. *Id.* at 25 (citing *Artco-Bell Corp. v. City of Temple*, 616 S.W.2d 190, 193 (Tex. 1981)).

224. *Schautteet v. City of San Antonio*, 702 S.W.2d 680 (Tex. App.—San Antonio 1985), *writ ref'd per curiam*, 706 S.W.2d 103 (Tex. 1986) (ninety days); *Fitts v. City of Beaumont*, 688 S.W.2d 1982 (Tex. App.—Beaumont 1985, writ ref'd n.r.e.) (sixty days).

225. *Borne v. City of Garland*, 718 S.W.2d 22, 25 (Tex. App.—Dallas 1986, no writ) (discussing TEX. CIV. PRAC. & REM. CODE § 101.101(c) (Vernon 1986) and *City of Houston v. Torres*, 621 S.W.2d 558 (Tex. 1981)).

226. 718 S.W.2d at 25.

227. 735 S.W.2d 675 (Tex. App.—Houston [1st Dist.] 1987, no writ).

228. *Id.* at 676.

incident giving rise to the plaintiffs' claim.²²⁹ The court concluded that the evidence raised a genuine issue of material fact whether the Hospital had "actual notice" of the plaintiffs' injury and reversed the summary judgment.²³⁰

B. Liability under 42 U.S.C. Section 1983

In *Rosow v. City of San Antonio*²³¹ the Texas Supreme Court declined to construe a "classified" civil service employee's wrongful termination claim under the Civil Rights Act of 1871²³² as an appeal from an administrative action.²³³ After the city of San Antonio terminated the plaintiff for her alleged incompetency, discourtesy to fellow employees, and conduct prejudicial to good order, the plaintiff appealed to the Municipal Civil Services Commission which unanimously recommended her reinstatement and requested a conference with the city manager. The city manager refused this request, disregarded the commission's recommendation, and terminated the plaintiff. Finding that the city's termination of the plaintiff was arbitrary and capricious, the jury awarded the plaintiff \$150,000 in damages, reinstatement, and attorneys' fees. The court of appeals, characterizing the plaintiff's claim as an appeal from an administrative action that is reviewable under the substantial evidence rule,²³⁴ found that substantial evidence existed to support the city manager's termination decision.²³⁵ Accordingly, it reversed the trial court's judgment and rendered that the plaintiff take nothing.²³⁶ In reversing the judgment of the court of appeals and affirming the judgment of the trial court, the supreme court noted that the court of appeals improperly classified the plaintiff's cause of action as an appeal from an administrative action and determined that the pleadings, evidence, issues, and instructions clearly set forth a section 1983 claim.²³⁷ The court distinguished *Martine v. Board of Regents*,²³⁸ a case in which the plaintiff sought reinstatement to his former job instead of damages and in which the section 1983 claim was, by counsel's own admission, a hastily-added alternate cause

229. *Id.* at 677.

230. *Id.* at 677-78.

231. 734 S.W.2d 659 (Tex. 1987), *cert. denied*, 108 S. Ct. 1021 (1988).

232. 42 U.S.C. § 1983 (1982) provides in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

233. 734 S.W.2d at 659.

234. *City of San Antonio v. Rosow*, 716 S.W.2d 633, 635 (Tex. App.—Corpus Christi 1986); *see supra* note 231 and accompanying text.

235. *Id.* at 639-40.

236. *Id.* The court of appeals recognized that the city did not object to the submission of the due process issue, but noted that "the jury's finding on such an issue was immaterial and cannot, as a matter of law, be the basis of a judgment." *Id.* at 637.

237. *Rosow v. City of San Antonio*, 734 S.W.2d 659, 660-61 (Tex. 1987).

238. 578 S.W.2d 465 (Tex. Civ. App.—Tyler 1979), *appeal after remand*, 607 S.W.2d 638 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.).

of action.²³⁹

During the Survey period, two Fifth Circuit decisions examined whether a court can hold a county jointly and severally liable for a back-pay judgment and whether injuries received during violence on a school bus may result in section 1983 liability. In *Barrett v. Thomas*²⁴⁰ Dallas County appealed an order of the district court holding it jointly and severally liable for a back-pay award to the plaintiff entered against Thomas, a former sheriff of Dallas County.²⁴¹ In holding that the court may hold the county jointly and severally liable for the back-pay award, the Fifth Circuit relied upon *Brandon v. Holt*²⁴² and *Kentucky v. Graham*,²⁴³ two decisions in which the United States Supreme Court held that if a plaintiff sues a government employee in his official capacity, the local government that has adequate notice of the suit and an opportunity to respond may be liable even though it is not a party to the suit.²⁴⁴ The Fifth Circuit then concluded that its prior holding in *Barrett I*²⁴⁵ and the law of the case doctrine required the conclusion that Barrett sued Thomas in his official capacity and that the county had the opportunity to intervene in the suit but failed to timely do so.²⁴⁶

After the *Barrett I* decision, but before the district court modified its ruling to hold the county jointly and severally liable for the back-pay award, Barrett filed a separate section 1983 suit against the county for failure to pay the tort judgment. The district court dismissed that suit because no outstanding judgment against the county then existed and awarded attorneys' fees to the county as a prevailing party under 42 U.S.C. section 1988. On appeal, the Fifth Circuit affirmed the district court's dismissal of Barrett's section 1983 suit;²⁴⁷ however, it reversed the attorneys' fee award, noting that the nonparty county's liability under section 1983 was unclear at the time of the *Barrett I* decision and that Barrett's claim was not frivolous because *Barrett I* may have implied that the county was liable for the back-pay award.²⁴⁸ The court also specifically declined to address whether Barrett's claim for failure to pay a tort judgment would be cognizable pursuant to section 1983 had there been a prior judgment against the county.²⁴⁹

239. 578 S.W.2d at 474. In his concurring opinion in *Rosow*, Justice Spears cautioned that the majority should not be read as a signal that every terminated municipal employee has a § 1983 cause of action. *Rosow v. City of San Antonio*, 734 S.W.2d at 661.

240. 809 F.2d 1151 (5th Cir. 1987).

241. The district court's order was a modification of a judgment rendered in a prior decision that was affirmed in part and reversed in part by the Fifth Circuit in *Barrett v. Thomas*, 649 F.2d 1193, 1202 (5th Cir. 1981) (*Barrett I*). In *Barrett I* the court affirmed the decision holding Thomas individually liable for his politically-motivated demotion of Barrett, but reversed the imposition of attorneys' fees against Thomas alone and rendered judgment holding the county jointly and severally liable for attorneys' fees. *Id.*

242. 469 U.S. 464 (1985).

243. 473 U.S. 159 (1985).

244. 809 F.2d at 1155.

245. *See supra* note 241.

246. *Barrett v. Thomas*, 809 F.2d at 1155.

247. *Id.* at 1156.

248. *Id.*

249. 809 F.2d at 1156 n.4. Similarly, the court declined to address the correctness of *Evans v. City of Chicago*, 689 F.2d 1286 (7th Cir. 1982), which holds that a failure to pay a tort judgment may support a § 1983 claim. 809 F.2d at 1155.

In *Lopez v. Houston Independent School District*,²⁵⁰ an action stemming from injuries a child received during a fight on a school bus, the Fifth Circuit affirmed a summary judgment dismissing section 1983 claims against the Houston Independent School District (HISD) and two supervisors, but reversed a summary judgment dismissing a section 1983 claim against the bus driver.²⁵¹ With respect to HISD the court noted that it could not hold the school district liable unless its policy or custom was the impetus for the violation of the child's civil rights.²⁵² The court then responded to Lopez's argument that HISD's training was inadequate or, in the alternative, that the bus driver ignored his training. Both arguments failed, according to the court, because no summary judgment evidence established that the fight on the bus was anything other than an episodic event.²⁵³ The court concluded, therefore, that HISD enacted no policy of nonprotection or inadequate training rising to the level of reckless disregard for the rights of the students.²⁵⁴ With respect to the bus driver, however, the court noted that the plaintiff's complaint, read liberally, alleged that the bus driver acted in callous disregard of the child's constitutional rights,²⁵⁵ and the court therefore concluded that the failure of the bus driver to protect the child or to render certain emergency aid may constitute an abuse of state power and may support a section 1983 claim if the bus driver's failure not only reached the level of gross negligence but also caused the injury.²⁵⁶

In *Bagg v. University of Texas Medical Branch*,²⁵⁷ a wrongful termination action, a Texas court of appeals reviewed a trial court's dismissal of the plaintiff's section 1983 claims based on governmental immunity. After determining that the state was immune from suit, the court addressed a novel issue in Texas: the extent of governmental immunity from suits based on section 1983.²⁵⁸ In resolving the issue, the court examined decisions of several other states and concluded that even though 42 U.S.C. section 1983 creates a constitutional tort, the states have power to decide whether or not to open their courts to plaintiffs bringing such claims.²⁵⁹ On appeal, however, the court of appeals reversed the district court's summary judgment in

250. 817 F.2d 351 (5th Cir. 1987).

251. *Id.* at 356.

252. *Id.* at 354 (citing *Palmer v. City of San Antonio*, 810 F.2d 514, 516 (5th Cir. 1987), and quoting *Mondell v. Department of Social Servs.*, 436 U.S. 658, 694 (1978)).

253. 817 F.2d 351, 354-55 (5th Cir. 1987). The court cited *Thibodeaux v. Arceneaux*, 768 F.2d 737, 739 (5th Cir. 1985), for the proposition that HISD was not liable under § 1983 for an employee's one-time violation of its safety procedures. 817 F.2d at 354.

254. 817 F.2d at 354. The court also cited *Thibodeaux v. Arceneaux*, 768 F.2d 737, 739 (5th Cir. 1985), for the proposition that the school district "could not be held liable under § 1983 for an episodic violation of its safety instructions." 817 F.2d at 354.

255. 817 F.2d at 355. The court held that such a factual allegation states a claim of constitutional deprivation under § 1983. *Id.* (citing *Jacquez v. Procunier*, 801 F.2d 789, 792 (5th Cir. 1986)).

256. *Id.* at 356.

257. 726 S.W.2d 582 (Tex. App.—Houston [14th Dist.] 1987, ref'd writ n.r.e.).

258. *Id.* at 585-86. The court noted that the question was novel "because most civil rights actions have been brought in federal courts, where the state is protected by the 11th Amendment." *Id.* at 586.

259. *Id.*

favor of the individual defendants.²⁶⁰ The appellate court noted that the district court based its summary judgments upon the defendants' qualified good faith immunity that exists in the absence of an allegation that they violated generally known statutory or constitutional rights.²⁶¹ Although the court of appeals recognized that the plaintiff failed to specifically allege such a violation as required by federal practice, the court applied Texas Rules of Procedure and concluded that the proper procedure was to outline the failure in specific special exceptions. If the court subsequently grants the special exceptions and the plaintiff fails to adequately amend, then a court should dismiss his suit.²⁶²

C. *Liability Under Texas Tort Claims Act*

In a case of first impression, the Texas Supreme Court significantly expanded the potential liability of municipalities by holding that, in certain circumstances, a municipality may be subject to exemplary damages. In *City of Gladewater v. Pike*²⁶³ the relatives of a deceased boy sought actual and exemplary damages for the alleged negligence of the city in its misplacement of the boy's body, which had been buried in a municipal cemetery. The court of appeals affirmed the trial court's judgment based upon a jury finding that the city was grossly negligent in failing to keep records and that the city's negligence proximately caused the loss of the boy's body. The supreme court affirmed the holding of the court of appeals that a municipality may be liable for exemplary damages, but determined that the city's conduct did not warrant exemplary damages.²⁶⁴ In arriving at its decision, the court examined the decisions of numerous jurisdictions that either deny exemplary damages as a matter of law,²⁶⁵ allow exemplary damages under the same circumstances as with corporations,²⁶⁶ or allow exemplary damages based upon the facts of each case.²⁶⁷ The court then examined numerous court of appeals' decisions and synthesized a two-prong test for imposing exemplary damages against municipalities.

The first prong, culpability of the municipal agent, requires that the mu-

260. *Id.* at 587.

261. *Id.* (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

262. *Id.*

263. 727 S.W.2d 514 (Tex. 1987).

264. *Id.* at 524. Before reaching the exemplary damages issue, the court noted that although the Texas Tort Claims Act does not authorize exemplary damages, the Act does not apply when a municipality acts in a proprietary, rather than a governmental capacity. *Id.* at 519. Even though no Texas court has ruled whether the operation of a cemetery is a proprietary function, the court noted that eight other jurisdictions had concluded that such operation was a proprietary function. *Id.*

265. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981); *Gonzalez v. City of Peoria*, 537 F. Supp. 793, 797 (D. Ariz. 1982); *City of Columbus v. Myszka*, 272 S.E.2d 302, 305 (Ga. 1980); *Urban Renewal Agency v. Tackett*, 255 So. 2d 904, 905 (Miss. 1971).

266. *Henningan v. Atlantic Ref. Co.*, 282 F. Supp. 667, 683 (E.D. Pa. 1967); *Dickerson v. Young*, 322 N.W.2d 93, 99 (Iowa 1983); *Young v. City of Des Moines*, 262 N.W.2d 612, 622 (Iowa 1978); *Rannels v. City of Cleveland*, 321 N.E.2d 885, 887-89 (Ohio 1975).

267. *Jackson v. Davis*, 530 F. Supp. 2, 5 (E.D. Tenn. 1981); *Holda v. County of Cane*, 410 N.E.2d 552, 563 (Ill. App. 1980); *Adams v. Salina*, 48 P. 918, 919 (Kan. 1897).

nicipality have acted with some culpability greater than gross negligence.²⁶⁸ The court agreed with the Fifth Circuit's reasoning in *Peace v. City of Center*²⁶⁹ that a plaintiff must plead and prove that the agent acted with malice, evil intent, or gross negligence or its equivalent.²⁷⁰ The second prong, attributing the agent's liability back to the municipality, requires that the municipality expressly have authorized the agent's acts, that the agent have committed the acts pursuant to an official policy, or that an official authorized to make policy personally have committed the act.²⁷¹

Applying its new two-pronged test to the facts before it in *City of Gladewater*, the supreme court concluded that no evidence indicating malice or evil intent on the part of the city officials existed and that, at best, plaintiffs proved indifference on the part of the officials involved.²⁷² Accordingly, the court reversed the holdings of the trial court and the court of appeals that plaintiffs were entitled to exemplary damages.²⁷³

The Texas courts of appeals rendered several decisions of note during the Survey period construing the Texas Tort Claims Act. In two decisions, *Bryant v. Metropolitan Transit Authority*²⁷⁴ and *Heyer v. Northeast Independent School District*,²⁷⁵ the courts of appeals interpreted the scope of the Tort Claims Act provisions waiving governmental immunity.²⁷⁶ In *Bryant* a bus passenger sought damages from the defendant transit authority²⁷⁷ for injuries he sustained when he was assaulted by other passengers on the defendant's bus. Under the Texas Tort Claims Act, a governmental unit has no immunity for damage it causes through the operation of motor vehicles and property.²⁷⁸ Nevertheless, in *Bryant* the court of appeals, over a forceful dissent, interpreted the Act to mean that no immunity exists if a governmental unit causes damage through its operation of motor vehicles *or* property.²⁷⁹ The court believed that the legislature, in codifying the limited immunity, did not intend to alter the meaning or scope of the Texas Tort Claims Act.²⁸⁰ In support of its holding the *Bryant* court cited section 1.001 of the Act, in which the legislature stipulates that it intended its revision of

268. 727 S.W.2d at 522-23. The usual test for gross negligence is the one set out by the supreme court in *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 920 (Tex. 1981).

269. 372 F.2d 649 (5th Cir. 1967).

270. 727 S.W.2d at 523 (approving *Peace*, 372 F.2d at 650).

271. *City of Gladewater v. Pike*, 727 S.W.2d 514, 523 (Tex. 1987) (citing *Thomas v. Sams*, 734 F.2d 185, 192 (5th Cir. 1984)).

272. *Id.* at 524.

273. *Id.* at 525. The supreme court recognized that the avowed purposes of exemplary damages may have no place in the context of municipalities and that certain policy arguments favor the denial of exemplary damages in these cases. The court noted, nevertheless, that "any exception to be carved out of the general rule of non-liability must create an *exceedingly* difficult burden to meet." *Id.* at 524 (emphasis in original).

274. 722 S.W.2d 738 (Tex. App.—Houston [14th Dist.] 1986, no writ).

275. 730 S.W.2d 130 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.).

276. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1986).

277. A transit authority qualifies as a local government entity by virtue of TEX. REV. CIV. STAT. ANN. art. 1118x, § 13A (Vernon Supp. 1988), and, therefore, is subject to the provisions of the Texas Tort Claims Act.

278. *Id.*

279. *Bryant v. Metropolitan Transit Auth.*, 722 S.W.2d at 740.

280. *Id.*

the Act adding the immunity limitation to effect no substantive change.²⁸¹ Accordingly, the court concluded that the word "and" in section 101.021(1)(B) of the Texas Tort Claims Act means "or" and, therefore, reversed the summary judgment in favor of the defendant transit authority.²⁸²

In *Heyer*²⁸³ a high school student who was waiting to board her school bus was injured in the school parking lot when a fellow student's car accelerated out of control. Appealing the trial court's summary judgment in favor of the school district, the plaintiff argued that the school district waived its governmental immunity by operating the school bus. The court of appeals stated that the plaintiff had to show that the officer's negligent or wrongful use of the governmental unit's motor vehicle proximately caused her injuries.²⁸⁴ In so holding, the court relied upon the common definition of the word "use" and upon the holding in *Jackson v. City of Corpus Christi*²⁸⁵ that the Texas Tort Claims Act requires that the governmental officer's negligence arise from the operation or use of the vehicle involved.²⁸⁶ The court then concluded that no facts supported a finding that any causal connection existed between the plaintiff's injuries and the school district's operation of the bus.²⁸⁷ Accordingly, the court affirmed the summary judgment in favor of the school district.²⁸⁸

Two courts of appeals considered whether a police officer's failure to perform certain duties entitles a claimant to recover for his injuries. In *Dent v. City of Dallas*²⁸⁹ the decedent's spouse and parents brought an action against police officers and the city for damages caused when a motorist fleeing from the police officers crashed into the decedent's car. The plaintiffs alleged that the officer's failure to arrest the motorist immediately after pulling him over constituted negligence and obtained a judgment against the city and one of the officers. On appeal on that theory, the court of appeals held that the police officer was a nonjudicial government official who performed his discretionary function in good faith.²⁹⁰ Consequently, the appellate court reversed the trial court and rendered a take nothing judgment against the plaintiffs.²⁹¹ Whether a police officer owes a duty to a third party injured by a person whom the officer had probable cause to arrest, but did not, was a question of first impression in Texas. After reviewing decisions of other jurisdictions holding that an officer owes no duty to specific individuals, the court concluded that Texas officers do not owe a specific duty.²⁹²

281. TEX. CIV. PRAC. & REM. CODE ANN. § 1.001 (Vernon 1986).

282. *Bryant*, 722 S.W.2d at 741.

283. *Heyer v. North East Indep. School Dist.*, 730 S.W.2d 130 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.).

284. *Id.* at 131.

285. 484 S.W.2d 806 (Tex. Civ. App.—Corpus Christi 1972, writ ref'd n.r.e.).

286. *Id.* at 810.

287. *Heyer*, 730 S.W.2d at 132.

288. *Id.* at 133.

289. 729 S.W.2d 114 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

290. *Id.* at 117.

291. *Id.*

292. *Id.* at 116. The court also held, as a matter of law, that the sole proximate cause of the accident was the grossly negligent conduct of the individual fleeing from the officer and stated

In a somewhat similar case, *Munoz v. Cameron County*,²⁹³ a murder victim's children brought an action against the county and the county sheriff alleging that their negligence in failing to timely execute an arrest warrant upon an individual, who subsequently shot the plaintiffs' mother, was the proximate cause of the mother's death. The court of appeals affirmed the trial court's summary judgment for the county because the plaintiffs' failed to allege or to prove facts establishing the county's waiver of its immunity under the Texas Tort Claims Act.²⁹⁴ The court of appeals also affirmed the summary judgment in favor of the sheriff.²⁹⁵ In doing so, the court noted that no cause of action for failure to execute a warrant exists at common law or by statute.²⁹⁶ The court also considered whether a sheriff's duty to execute an arrest warrant²⁹⁷ extends to specific people or to the general public. Relying upon *South v. Maryland*,²⁹⁸ the court concluded that a sheriff's duty runs to the general public and not to a specific individual.²⁹⁹ Nevertheless, the court did recognize an exception to this rule of nonliability when a special relationship exists between the victim and the agency or officer.³⁰⁰ In the *Munoz* case, however, the court concluded that no evidence of such a special relationship existed.³⁰¹

During the Survey period, several courts of appeals examined the issue of governmental immunity in the context of city water treatment and sewer operations. In *Parr Golf, Inc. v. City of Cedar Hill*³⁰² the plaintiff brought an action against the city alleging he suffered emotional distress when he saw and smelled the raw sewage that backed up onto his property from a clogged city sewer. In reviewing a summary judgment in favor of the city based on its sovereign immunity, the court noted that operating and maintaining a sanitary sewer is a governmental function.³⁰³ The court also examined the code section providing a waiver of governmental immunity for personal injury and death caused by a condition or use of tangible personal or real property if a private person would be liable under Texas law.³⁰⁴ The court then concluded that the trial court's summary judgment in favor of the city was improper because the city's operation and maintenance of the sewer is a use of tangible property and because the plaintiff's deposition testimony established an issue of fact as to whether he suffered an injury (nausea) when he discovered the raw sewage on his property.³⁰⁵ The court held that some

that police officers are not the insurers for the conduct of the suspects they pursue. *Id.* at 116-17.

293. 725 S.W.2d 319 (Tex. App.—Corpus Christi 1986, no writ).

294. *Id.* at 320.

295. *Id.* at 323.

296. *Id.* at 321.

297. See TEX. CODE CRIM. PROC. ANN. art. 15.01 (Vernon 1977).

298. 59 U.S. (18 How.) 396 (1855).

299. *Munoz v. Cameron County*, 725 S.W.2d at 322.

300. *Id.* at 322 (citing *Fair v. United States*, 234 F.2d 288 (5th Cir. 1956)).

301. *Id.*

302. 718 S.W.2d 46 (Tex. App.—Dallas 1986, no writ).

303. *Id.* at 47.

304. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1986)).

305. *Id.* at 47-48.

evidence of physical injury existed, and thus the court did not address whether the recent supreme court decision in *Moore v. Lillebo*³⁰⁶ applies in the context of a negligence action.³⁰⁷

In a similar case, *Brown & Root, Inc. v. City of Cities Municipal Utility District*,³⁰⁸ the utility district obtained a summary judgment on grounds of sovereign immunity against homeowners who alleged mental distress due to the sunken condition of their homes. The homeowners claimed that their homes subsided as a result of the utility district's allegedly negligent design and installation of a drainage culvert. In determining whether the district's conduct fell within the waiver provisions of the Texas Tort Claims Act, the court of appeals found that the manner in which the utility district designed, installed, and used the culvert satisfied the waiver of immunity requirement that the utility district's use of the property contributed to the injury.³⁰⁹ The court then turned to the question of whether the plaintiffs' allegations of mental distress qualified as personal injuries within the meaning of the Texas Tort Claims Act. The court noted that the general rule requires proof of physical injury resulting from the alleged mental anguish.³¹⁰ After examining several cases noted in *Moore v. Lillebo*,³¹¹ the court stated that certain torts inherently cause mental anguish and that when such a tort is involved, courts need not require proof of physical injury.³¹² The court then concluded that the plaintiffs' allegations raised the issue of mental anguish and, in this context, satisfied the personal injury requirement of the exception to immunity under the Texas Tort Claims Act.³¹³ Accordingly, the court reversed the summary judgment in favor of the utility district.³¹⁴

Claimants alleging that a city's operation of a water treatment and sewage plant, or of a sewer system, resulted only in damage to property, however, have not been able to rely upon the exception to the city's immunity provided by the Texas Tort Claims Act. Rather, courts limit such claimants to allegations of a "taking" of property in contravention of the Texas Constitution.³¹⁵ In *Abbott v. City of Kaufman*³¹⁶ landowners sought to recover for damage to their property caused by flooding of water which the city discharged from its sewage treatment plant. Noting that Texas, unlike most states, characterizes a city's construction and operation of a sanitary sewer system as a governmental function, the court concluded that the landowners' claim for property damage did not fall within an exception to governmental

306. 722 S.W.2d 683 (Tex. 1986) (proof of physical injury need not be shown to recover for mental anguish suffered by wrongful death beneficiaries).

307. 718 S.W.2d at 48.

308. 721 S.W.2d 881 (Tex. App.—Houston [1st Dist.] 1986, no writ).

309. *Id.* at 884 (citing *Salcedo v. El Paso Hosp. Dist.*, 659 S.W.2d 30, 32 (Tex. 1983)).

310. *Id.*

311. 29 Tex. Sup. Ct. J. 513, 514 (July 12, 1986).

312. 721 S.W.2d at 885.

313. *Id.*

314. *Id.*

315. TEX. CONST. art. 1, § 17 provides: "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made unless by consent of such person."

316. 717 S.W.2d 927 (Tex. App.—Tyler 1986, writ dismissed).

immunity under the Texas Tort Claims Act.³¹⁷ Nevertheless, the court reversed a summary judgment in favor of the city because the landowners had alleged a cause of action for the taking of their property resulting from the construction of a public improvement compensable under the Texas Constitution.³¹⁸

In *City of Abilene v. Smithwick*³¹⁹ the court addressed a similar claim by landowners for damage to their property due to sewer backups. In reversing a jury verdict in favor of landowners, the court of appeals noted that to recover for a taking under article I, section 17, of the Texas Constitution, the landowners had to prove the city acted intentionally.³²⁰ The court then reviewed the evidence, found no evidence that the city intentionally took the landowners' property for public use, and rendered judgment that landowners take nothing.³²¹

V. OFFICERS AND EMPLOYEES

During the Survey period, both Texas and federal courts considered numerous issues involving officers and employees of local governments and governmental divisions. The cases discussed in this section address due process and administrative issues in connection with a government's termination or suspension of its employees, the constitutionality of a government's abolition of its justice of the peace positions, the applicability of mandamus actions relating to government employees, and a governmental officer's or employee's immunity from tort liability.

A. Termination and Indefinite Suspension of Employees

Federal courts addressed constitutional challenges to a university's termination of a truck-driving instructor in one decision and a school district's nonrenewal of a contract of a probationary teacher in another decision. In *Yates v. Board of Regents*³²² a district court denied a university's motion for partial summary judgment and concluded that fact issues existed concerning whether the plaintiff had a property interest in continued employment and whether the university allowed her due process before firing her.³²³ The plaintiff was hired as a truck-driving instructor at the university and the university thereafter renewed her appointment on two separate occasions. Although at the last renewal both parties expected her employment to continue for approximately ten months, her supervisors sent her numerous letters indicating deficiencies in her performance. The plaintiff then resigned and brought an action alleging that the university constructively discharged her in violation of her due process rights. Addressing whether the plaintiff held any property interest in continued employment, the district court noted

317. *Id.* at 930.

318. *Id.* at 933.

319. 721 S.W.2d 949 (Tex. App.—Eastland 1986, writ ref'd n.r.e.).

320. *Id.* at 951.

321. *Id.* at 952-53.

322. 654 F. Supp. 979 (E.D. Tex. 1987).

323. *Id.* at 981-82.

that such an interest, as created and defined by state law, may be contained either in an employment agreement or in a state statute, rule, or regulation.³²⁴ Notwithstanding the absence of an express employment contract or Texas courts' adherence to the employment-at-will doctrine, the court concluded that it could not rule, as a matter of law, that the plaintiff had no property interest in her continued employment since she produced some evidence of a university practice requiring cause for dismissal of nonprobationary employees.³²⁵ The court also declined to rule, as a matter of law, that pre-termination written notices of the university's perceived concerns complied with due process requirements.³²⁶ The court noted that the existence of a genuine issue of fact as to whether the university's written notices allowed the plaintiff an opportunity to respond to the supervisor's complaints.³²⁷ The court also pointed to evidence that university officials never told the plaintiff of her right to a grievance hearing as provided in the university's personnel handbook.³²⁸

In *Montgomery v. Trinity Independent School District*³²⁹ the plaintiff, a probationary teacher, alleged that the school district based its decision not to renew her contract on her constitutionally protected activities as president of the Texas State Teachers Association. The court adopted the following test for determining whether a school district's termination of an employee conflicts with the employee's exercise of his or her constitutionally protected first amendment rights: initially, the employee must show that his or her constitutionally protected behavior was a factor in the school district's decision to terminate the employee. If the employee successfully links his or her termination to his or her exercise of first amendment rights, then the employer must demonstrate that its termination decision was not based on the employee's constitutionally protected conduct.³³⁰ The court faulted the fact that the plaintiff did not offer evidence of any specific first amendment activities, either in her public capacity or in her capacity with the Texas State Teachers Association, and thus affirmed the trial court's directed verdict for the district, reiterating that, absent first amendment protections, a nontenured teacher has no constitutional right to demand that a school district explain the basis for his or her termination.³³¹ The court also relied upon

324. *Id.* at 981 (citing *Bishop v. Wood*, 426 U.S. 351 (1976)). The court also noted that, absent a contract term to the contrary, Texas employers and employees may terminate their relationship at any time without cause. *Id.* at 981 (citing *Reynolds Mfg. Co. v. Mendoza*, 644 S.W.2d 536, 539 (Tex. App.—Corpus Christi 1982, no writ)). The court also noted that employee handbooks standing alone do not create contractual rights regarding termination procedures. *Id.* at 981 (citing *Vallone v. Agip*, 705 S.W.2d 756, 757 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.)).

325. *Id.*

326. *Id.* at 982. The court stated that the employee must have written notice of the reasons for termination and an opportunity to respond to those reasons prior to termination. *Id.* at 981-82 (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985)).

327. *Id.*

328. *Id.*

329. 809 F.2d 1058 (5th Cir. 1987).

330. *Id.* at 1061 (citing *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)).

331. *Id.* at 1061 (citing *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972)).

the lack of any evidence indicating that the board or any board member acted in retaliation for plaintiff's alleged activities or views.³³² The court also noted that, even though the board deviated from its standard practice in making nonrenewal decisions, its deviation did not constitute evidence of the school district's retaliation or of its impermissibly unfair treatment.³³³ Accordingly, the court concluded that no conflicting substantial evidence created a jury question and, therefore, affirmed the trial court's ruling.³³⁴

In *Plaster v. City of Houston*³³⁵ a Houston police officer sought review of an order of the Houston Civil Service Commission upholding his indefinite suspension. The suspension stemmed from the officer's refusal to obey an order from the police chief requiring the officer to answer questions and to make a written statement in connection with a department investigation of his use of a throw-down gun. On appeal, the officer argued that the order was unlawful and that the police chief and the commission improperly considered the use of the throw-down gun, which occurred more than six months prior to the suspension.³³⁶ Challenging the legality of the police chief's order, the officer relied upon the order's statement that the department could not use any information or evidence that it gained in its investigation against him in any criminal proceeding. The officer asserted that the statement was incorrect and thus made the order illegal since his statement subsequently could be used to impeach him. The court concluded, however, that the order was accurate, and thus lawful, since any statement by the officer would have been involuntary and, therefore, not usable for any purpose, including impeachment, in a criminal trial.³³⁷

The court also rejected the officer's second assertion that the police chief and the commission improperly considered actions that occurred more than six months prior to the date of suspension.³³⁸ Although the throw-down gun incident occurred three years before the suspension, the acts that the police chief complained of related not to that incident, but to the officer's refusal to obey the lawful order that occurred less than six months prior to the date of suspension. The court stated that the chief of police may use acts and events outside the six-month period to explain and evaluate acts within the six-month period.³³⁹ Accordingly, the court affirmed the judgment of

332. *Id.*

333. *Id.*

334. *Id.* at 1062.

335. 721 S.W.2d 421 (Tex. App.—Houston [1st Dist.] 1986, no writ).

336. TEX. REV. CIV. STAT. ANN. art. 1269m, § 26 (repealed), states:

Indefinite Suspensions. . .

. . . .

. . . [N]o act or acts may be complained of by said [chief of police] which did not happen or occur within six (6) months immediately preceding the date of suspension

Id.

337. 721 S.W.2d at 423 (citations omitted).

338. *Id.*; see *supra* note 336.

339. 721 S.W.2d at 423 (citing *Vick v. City of Waco*, 614 S.W.2d 861, 863 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.); *City of Houston v. Dillon*, 596 S.W.2d 212, 214 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.)).

the trial court upholding the officer's indefinite suspension.³⁴⁰

In *Burke v. Central Education Agency*³⁴¹ the plaintiff sought judicial review of a school district's nonrenewal of his contract. His administrative appeals of the school district's action concluded with the state board of education's denial of his motion for rehearing. The court of appeals considered whether the trial court properly granted summary judgment against the plaintiff because his motion for rehearing before the state board of education lacked sufficient particularity to comply with section 16(e) of the Administrative Procedure and Texas Register Act (APTRA).³⁴² Prior to examining Burke's motion for rehearing, the court recognized that APTRA section 16(e) is silent concerning specificity.³⁴³ Nevertheless, relying upon *Suburban Utility Corp. v. Public Utility Commission*,³⁴⁴ the court of appeals concluded that ATPRA section 16(e) requires that a complaining party must, in his motion for rehearing assert the following two elements regarding each point of error: first, the agency's specific action that he or she asserts was error; and, secondly, the legal foundation of such assertion.³⁴⁵ Reviewing the plaintiff's motion for rehearing,³⁴⁶ the court found that each point was insufficient to inform the agency of the error claimed or asserted.³⁴⁷ In addition, the court concluded that the plaintiff's adoption by reference of the entire administrative record did not satisfy the requirements of section 16(e) because it burdened the agency with the onus of uncovering its own mistakes and correcting them.³⁴⁸ Accordingly, the court affirmed the trial court's summary judgment against the plaintiff.³⁴⁹

B. *Firemen's and Policemen's Civil Service Act*

In *Firefighters' and Police Officers' Civil Service Commission v. Ceazer*³⁵⁰ the court reviewed an action in which a firefighter sought and obtained a writ of mandamus compelling the Firefighters' and Police Officers' Civil Service Commission to reinstate him.³⁵¹ In its appeal, the commission argued

340. *Id.*

341. 725 S.W.2d 393 (Tex. App.—Austin 1987, writ ref'd n.r.e.).

342. TEX. REV. CIV. STAT. ANN. art. 6252-13a (Vernon Supp. 1988). The court of appeals previously had reviewed the judgment and concluded that the pleading requirement for rehearing motions contained in the APTRA could not be reconciled with, and gave controlling effect to, the analogous provisions of the Term Contract Nonrenewal Act, TEX. EDUC. CODE ANN. §§ 21.201-.211 (Vernon Supp. 1988). Accordingly, the court of appeals reversed the summary judgment against the teacher. *Burke v. Central Educ. Agency*, 701 S.W.2d 306, 313 (Tex. App.—Austin 1985). The Texas Supreme Court, however, reversed that decision and remanded the action to the court of appeals to determine if the teacher's motion for rehearing was sufficiently specific to constitute compliance with APTRA § 16(e). *Central Educ. Agency v. Burke*, 711 S.W.2d 7, 9 (Tex. 1986).

343. 725 S.W.2d at 396.

344. 652 S.W.2d 358, 365 (Tex. 1983).

345. 725 S.W.2d at 397.

346. To examine the six points raised in Burke's motion for rehearing, see *id.* at 398.

347. *Id.* at 398-99.

348. *Id.* at 399.

349. *Id.*

350. 725 S.W.2d 431 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

351. The trial court granted the writ of mandamus compelling reinstatement because the commission failed to hold a hearing within thirty days of the firefighter's notice of appeal. See

that the trial court lacked jurisdiction because the firefighter failed, as a matter of law, to invoke the commission's jurisdiction. The court recognized that unless the firefighter properly invoked the jurisdiction of the commission, the trial court lacked jurisdiction.³⁵² The court also recognized that a firefighter must file his appeal to the commission within ten days of the action of which he complains and that such appeal must contain a denial of the charge, an exception to the legal sufficiency of the charge, an allegation that the recommended action is in excess of the alleged offense, any combination of the foregoing, and a request for a commission hearing.³⁵³ Although the firefighter timely filed his notice of appeal, the notice failed to include any of the requisites. The court concluded, therefore, that in the absence of jurisdiction, the commission did not have to hold a hearing within thirty days or reinstate the firefighter.³⁵⁴

C. *Mandamus Actions*

In *Smith v. Flack*³⁵⁵ the Texas Court of Criminal Appeals held, in part, that court-appointed criminal defense attorneys were entitled to a writ of mandamus compelling the county auditor, acting pursuant to his statutory authority, to pay attorneys' fees awarded by a district court judge.³⁵⁶ In *Smith* the district court judge awarded attorneys' fees to the plaintiff's attorney for prosecuting an appeal. When the plaintiff presented his claim to the county auditor, however, he discovered that the Board of Judges Trying Criminal Cases in Harris County amended their local rules to establish a fee schedule for court-appointed attorneys with minimum and maximum fees for each category provided in article 26.05 of the Texas Code of Criminal Procedure.³⁵⁷ The county auditor transferred the matter to the board of judges, who denied the plaintiff's claim and approved a reduced amount.

In *Smith* the majority recognized that a court may only issue a writ of mandamus when the plaintiff seeks to compel a ministerial act, or a duty which the law requires the officer to perform.³⁵⁸ In enacting article 26.05 of the Code of Criminal Procedure, which unambiguously authorizes a county to pay fees to court-appointed attorneys, the legislature set minimum fees, but specifically avoided setting maximum limits on attorneys' fees.³⁵⁹ Reviewing the duty of the county auditor, the court noted that the Texas Legislature requires a county auditor to examine and approve each claim or bill

TEX. REV. CIV. STAT. ANN. art. 1269m (repealed and codified as TEX. LOCAL GOV'T CODE ANN. § 143.010 (Vernon Pam. 1988)).

352. 725 S.W.2d at 433.

353. *Id.* (quoting TEX. REV. CIV. STAT. ANN. art. 1269m, § 17 (repealed and codified as TEX. LOCAL GOV'T CODE ANN. § 143.010 (Vernon Pam. 1988))).

354. *Id.* at 433. The court also relied upon *City of Plano Firefighters' and Police Officers' Civil Service Commission v. Maxam*, 685 S.W.2d 125 (Tex. App.—Dallas 1985, writ ref'd n.r.e.), and concluded that *Maxam* was indistinguishable from this action. *Id.*

355. 728 S.W.2d 784 (Tex. Crim. App. 1987) (en banc).

356. *Id.* at 794. The requirement that appointed criminal counsel must be paid by the county is set out in TEX. CRIM. PROC. CODE ANN. art. 26.05, § 1(a), (e) (Vernon Supp. 1988).

357. TEX. CRIM. PROC. CODE ANN. art. 26.05 (Vernon 1966).

358. 728 S.W.2d at 789.

359. *Id.*

that the county contemplates paying.³⁶⁰ The court concluded that the county auditor failed to perform his statutory duty, approving the plaintiff's claim for attorneys' fees, by delegating his duty to the board of judges.³⁶¹ The court held, therefore, that the court appointed attorney could compel the county auditor to assume the duty he delegated to the board of judges and to examine and approve his or her attorneys' fees claims.³⁶²

*D. Liability of Officers and Employees*³⁶³

In *United States v. Davis*³⁶⁴ the Fifth Circuit Court of Appeals reviewed and affirmed a trial court's conviction of guards at a state mental hospital, under 18 U.S.C. section 241,³⁶⁵ for conspiring to violate the civil rights of a hospital patient. The United States accused the guards of beating a patient. Although the guards did not dispute that they beat the patient, they argued on appeal that insufficient evidence existed to support a finding that they acted in a conspiracy.³⁶⁶ The court disagreed, however, and noted that the concert element of conspiracy may be proven by circumstantial evidence as well as by the existence of a common motive.³⁶⁷ The court then recognized that the evidence supported findings that the guards shared a common motive of preventing patients from testifying before an abuse committee, that the guards acted jointly in the beatings, and that the guards cooperated in covering up their conduct.³⁶⁸ Accordingly, the court affirmed the jury's conviction that the state hospital guards conspired to violate the hospital patient's civil rights.³⁶⁹

In *Collin County v. Homeowners Association for Values Essential to Neighborhoods*³⁷⁰ a federal district judge held that county commissioners and a county judge enjoy absolute legislative immunity from liability. In *Homeowners Association* Collin County sought a declaratory judgment stating the sufficiency of a final environmental impact statement for a proposed state highway and enjoining the defendant homeowners association from interfering with the construction of the highway. The defendant filed counterclaims against the county judge and the county commissioners alleging their violation of the defendant's civil rights, malicious prosecution, and abuse of legal process. In considering the counter-defendants' motion to dismiss based on absolute legislative immunity, the court ruled that local legislators are abso-

360. *Id.* at 790 (citing TEX. REV. CIV. STAT. ANN. art. 1660 (Vernon 1962)).

361. 728 S.W.2d at 790.

362. *Id.* The court did so after concluding that it had jurisdiction to issue a writ of mandamus in this context since the instant case involved a criminal law matter. *Id.* at 788-89. The court concluded that a civil suit would be an inadequate remedy for the attorney. *Id.* at 792.

363. See also Tort Liability, *supra* section V.

364. 810 F.2d 474 (5th Cir. 1987).

365. 18 U.S.C. § 241 (1982) prohibits "two or more persons [from] conspir[ing] to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States. . . ."

366. 810 F.2d at 476.

367. *Id.* at 477 (citations omitted).

368. *Id.*

369. *Id.*

370. 654 F. Supp. 943, 949-50 (N.D. Tex. 1987).

lutely immune from liability for conduct within the scope of their legislative duties.³⁷¹ Nevertheless, the court noted that such immunity exists only for actions that the officers take as part of their legitimate legislative activity.³⁷² In its counterclaims, the defendant alleged that the commissioners conspired to injure it, that the commissioners' actions were ultra vires, and that the commissioners acted outside their capacity as public officials. The court noted that the commissioners' absolute legislative immunity defense would not prevail if the defendant could support its allegations in the counterclaims with specific facts.³⁷³ After reviewing the counterclaims and relying on *Elliott v. Perez*,³⁷⁴ the court stated that the broad allegations that the defendant made could not overcome the commissioners' immunity defense and thus granted the commissioners' motion to dismiss.³⁷⁵

Concerning the county judge, the court noted that Texas county judges may act in a legislative capacity.³⁷⁶ The court then concluded that the county judge also enjoyed absolute legislative immunity and granted his motion to dismiss.³⁷⁷ The court, however, did allow the defendant leave to amend its counterclaims in order to allege specific supporting facts.³⁷⁸

E. Constitutionality of Abolition of Justice of the Peace Positions

In *McCraw v. Vickers*³⁷⁹ the court of appeals held that the Bexar County commissioners court's abolition of three justice of the peace positions did not violate any state constitutional provisions or the due process rights of prospective candidates for such positions.³⁸⁰ After providing notice and an opportunity for concerned citizens to be heard, the commissioners court passed a "judicial abolition order," abolishing three justice of the peace positions in Bexar County. The plaintiffs argued that the judicial abolition order directly violated article 5, section 18 of the Texas Constitution.³⁸¹ The controversy concerned whether section 18(a) required an additional justice of the peace whenever the population of a city *partly* in the precinct exceeded 18,000 or only when the population of a city *wholly* in the precinct exceeded 18,000. The court noted that section 18 of article 5 is merely for the convenience of

371. *Id.* at 949 (citations omitted).

372. *Id.*

373. *Id.*

374. 751 F.2d 1472 (5th Cir. 1985).

375. 654 F. Supp. at 949 (citing *Elliott v. Perez*, 751 F.2d at 1479).

376. *Id.* at 949 n.7 (citing *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980)).

377. *Id.*

378. *Id.* at 954. The court recognized, nevertheless, that one method of preventing meritless suits against public officials is rigid enforcement of FED. R. CIV. P. 11 and indicated its intent to scrutinize closely any amended counterclaims. 654 F. Supp. at 954.

379. 717 S.W.2d 738 (Tex. App.—San Antonio 1986) writ conditionally granted on other grounds, 722 S.W.2d 140 (Tex. 1987).

380. *Id.* at 744-45.

381. "[I]n each precinct there shall be elected one Justice of the Peace and one Constable . . . provided that . . . in any precinct in which there may be a city of 18,000 or more inhabitants, there shall be elected two Justices of the Peace." TEX. CONST. art. 5, § 18(a) (1891, amended 1983).

the people³⁸² and held that section 18(a) requires a city of 18,000 or more residents to be completely within a precinct in order to have an additional justice of the peace.³⁸³ Since all parties stipulated that no incorporated city with a population of 18,000 or more inhabitants is wholly within a single justice of the peace precinct in Bexar County, the court overruled the plaintiffs' constitutional claim.³⁸⁴

The plaintiffs also alleged that, since the judicial abolition order did not become effective until after they filed for election to the office of justice of the peace, they were denied due process of law. In rejecting this claim, the court noted that no constitutional or statutory time limit exists on a county's ability to abolish a justice of the peace position, that neither plaintiff held a property interest since each had merely filed for the office, and that the plaintiffs received appropriate notice³⁸⁵ of the hearings on the proposed judicial abolition order.³⁸⁶ Accordingly, the court affirmed the judgment of the trial court upholding the judicial abolition order.³⁸⁷

VI. POLICE POWER

During the Survey period several courts discussed the police power of local governments. In *Lindsay v. City of San Antonio*³⁸⁸ several businesses engaged in leasing and selling portable signs alleged that a city ordinance prohibiting such signs was unconstitutional. In granting a preliminary injunction to plaintiffs, the district court treated the prohibition as a content neutral ordinance affecting commercial and noncommercial speech equally.³⁸⁹ The district court found a substantial likelihood that plaintiffs would succeed on the merits because the city failed to show that the ordinance furthers its goal of improving the city's aesthetic appearance and because, even if the ordinance furthered the city's aesthetic interest, a more narrowly tailored ordinance could achieve the same effect.³⁹⁰

On review,³⁹¹ the court of appeals concluded that the ordinance furthered

382. 717 S.W.2d at 743 (citing *Williams v. Castleman*, 112 Tex. 193, 247 S.W. 263 (Tex. 1922) (further citations omitted)).

383. *Id.*

384. *Id.*

385. The court concluded that notice complied with the requirements of the Open Meetings Act, TEX. REV. CIV. STAT. ANN. art. 6252-17 (Vernon Supp. 1988).

386. 717 S.W.2d at 744-45.

387. *Id.* at 745.

388. 821 F.2d 1103 (5th Cir. 1987).

389. The district court applied a test enunciated in *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), which provides that:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 805.

390. 821 F.2d at 1106. The district court also concluded that a more narrowly tailored ordinance could also serve the city's other asserted interest of furthering traffic safety. *Id.*

391. The court initially addressed the scope of review and declined to limit its focus to an examination of whether the district court's issuance of the preliminary injunction was an abuse of discretion. Rather, the court relied upon *Dunagin v. City of Oxford*, 718 F.2d 738 (5th Cir.

the city's interest in aesthetics.³⁹² The court noted that total realization of the governmental goal is not mandatory; rather, furtherance of the governmental interest may justify a specific restriction on speech.³⁹³ The court of appeals, unlike the district court, concluded that the ordinance did not have an inconsequential effect, notwithstanding the proliferation of nonportable signs in a particular area.³⁹⁴ In concluding that the city's total ban on portable signs was not substantially broader than necessary, the court recognized that portable signs, like billboards and posted signs, by their very nature, can harm a city aesthetically, regardless of where they are located and however they are constructed.³⁹⁵ Accordingly, the court upheld the ordinance as a valid exercise of the city's police power.³⁹⁶

In *Olvera v. State*³⁹⁷ a group of picketers challenged the constitutionality of a statute making mass picketing a misdemeanor.³⁹⁸ After the district court convicted the defendants of the misdemeanor of mass picketing, they challenged the picketing statute as arbitrarily overbroad. Although the statute was content neutral, the court of appeals recognized that picketing contains elements of both speech and conduct.³⁹⁹ Applying a four-part test set out in *United States v. O'Brien*,⁴⁰⁰ the court concluded first that the state may regulate the use of city streets and facilities for the public's safety and convenience.⁴⁰¹ Second, the state has a substantial governmental interest in public safety and in preventing violence before it occurs.⁴⁰² Third, when a picketing statute is content neutral and applies to all picketing, it is unrelated to the exercise of free expression.⁴⁰³ Fourth, the statute did not unreasonably interfere with speech or the distribution of information.⁴⁰⁴ Accordingly, the court of appeals affirmed the district court's judgment and

1983), *cert. denied*, 467 U.S. 1259 (1984), and *Rankin v. McPherson*, 107 S. Ct. 2891 (1987), for the proposition that it need not rely heavily on the findings of fact made by the district court. 821 F.2d at 1107-08.

392. 821 F.2d at 1110.

393. *Id.* at 1109.

394. *Id.* at 1109-10.

395. *Id.* at 1111 (citing *Vincent*, 466 U.S. at 808).

396. *Id.* at 1112.

397. 725 S.W.2d 400 (Tex. App.—Houston [1st Dist.] 1987, no writ).

398. TEX. REV. CIV. STAT. ANN. art. 5154d (Vernon 1987) provides: "Mass picketing [includes] any form of picketing in which . . . [t]here are more than two (2) pickets at any time within either fifty (50) feet of any entrance to the premises being picketed, or within fifty (50) feet of another picket or pickets . . ." *Id.*

399. 725 S.W.2d at 402 (citing *Shuttlesworth v. City of Birmingham*, 394 U.S. 147).

400. 391 U.S. 367, 377 (1968): [1] If [the regulation] is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

401. 725 S.W.2d at 402.

402. *Id.* at 402-03.

403. *Id.* at 403.

404. *Id.* at 404. Although acknowledging that federal district courts had recently struck down the statute on overbreadth grounds, the court noted that those courts failed to recognize the reasoning of the Texas Court of Criminal Appeals in *Sherman v. State*, 626 S.W.2d 520, 526 (Tex. Crim. App. 1981). 725 S.W.2d at 404 (citing *Nash v. Texas*, 632 F. Supp. 951 (E.D. Tex. 1986); *Howard Gault Co. v. Texas Rural Legal Aid, Inc.*, 615 F. Supp. 916 (N.D. Tex. 1985)). In *Sherman* the court of criminal appeals found that the prevention of violence is a

upheld the constitutionality of the mass picketing statute.⁴⁰⁵

In *Bolling v. Texas Animal Health Commission*⁴⁰⁶ the trial court upheld the constitutionality of chapter 163 of the Agriculture Code⁴⁰⁷ enabling the commission, pursuant to a Brucellosis control program, to brand and slaughter cattle that had been exposed to Brucellosis.⁴⁰⁸ The plaintiff in *Bolling* argued that the Brucellosis control program was an unreasonable exercise of the police power and effected a taking without compensation. Rejecting these arguments, the court noted that to survive a constitutional challenge, an economic regulation need only rationally relate to a state's legitimate interest.⁴⁰⁹ As a result, the court upheld the constitutionality of the control program, even though the program may not be the best possible method of controlling Brucellosis.⁴¹⁰ In addition, the court stated that merely because the control program deprived the owner of the highest price he might receive for his cattle, it was not an unconstitutional taking.⁴¹¹ The court found, instead, that the control program was a legitimate exercise of the police power.⁴¹²

In *Citizens for Better Education v. Goose Creek Consolidated Independent School District*⁴¹³ the court of appeals affirmed the trial court's judgment that a school board has the power to constitutionally adopt a rezoning plan in order to promote an equal ethnic balance in the district's schools.⁴¹⁴ Perceiving that demographic shifts within their school district had altered the ethnic composition of the two high schools within the district, the district trustees adopted a rezoning plan changing the attendance zones for both schools. Although the plaintiffs argued that no court ordered desegregation plan required the rezoning, the court held that court ordered desegregation is not a prerequisite to a school board's efforts to achieve integration.⁴¹⁵ In addition, the court noted that school authorities are vested with broad, discretionary powers to formulate educational policy.⁴¹⁶ The court concluded

valid state interest justifying some first amendment infringement. *Sherman v. State*, 626 S.W.2d 520, 526 (Tex. Crim. App. 1981).

405. *Olvera*, 725 S.W.2d at 404.

406. 718 S.W.2d 819 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

407. TEX. AGRIC. CODE ANN. § 161.131 (Vernon 1982).

408. *Id.*

409. 718 S.W.2d at 820 (citing *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124 (1978)).

410. *Id.* at 821.

411. *Id.*

412. *Id.* (citing *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979); *Nunley v. Texas Animal Health Comm'n*, 471 S.W.2d 144, 150 (Tex. Civ. App.—San Antonio 1971, writ ref'd n.r.e.)).

413. 719 S.W.2d 350 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.), appeal dismissed w.o.j., 108 S. Ct. 49 (1987).

414. *Id.* at 354-55.

415. *Id.* at 352.

416. *Id.* (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)). The court also noted that TEX. EDUC. CODE ANN. § 23.26(b) (Vernon 1987) exclusively empowers school trustees to manage and govern the public schools within their district and that it would not interfere with such power unless there is a clear abuse of power and discretion. 719 S.W.2d at 354 (citing *Nichols v. Aldine Indep. School Dist.*, 356 S.W.2d 182, 185 (Tex. Civ. App.—Houston 1962, no writ); *Kissick v. Garland Indep. School Dist.*, 330 S.W.2d 708, 710 (Tex. Civ. App.—Dallas 1959, writ ref'd n.r.e.)).

that because the rezoning plan, although premised on racial inequality, was designed to promote integration, it should review the plaintiffs' equal protection claims under a "rational basis" analysis, rather than a "strict scrutiny" analysis.⁴¹⁷ Nevertheless, the court found, even under strict scrutiny, the rezoning plan would stand because providing an integrated education is a compelling interest,⁴¹⁸ because the plan was the least disruptive plan that the school district reviewed, and because the plan was substantially related to the district's interest of providing an integrated education.⁴¹⁹ Accordingly, the court affirmed the judgment of the trial court.⁴²⁰

The Texas Supreme Court, in *State v. Project Principle, Inc.*,⁴²¹ heard an appeal from a temporary injunction prohibiting literacy and competency testing of currently certified public school teachers.⁴²² The supreme court rejected the plaintiff's argument that its equal protection claim was subject to strict scrutiny analysis. Drawing from the teachings of *Schwartz v. Board of Bar Examiners*,⁴²³ the court concluded that the right to teach is not fundamental and held that the challenged competency testing was rationally related to the state's interest in maintaining competent teachers in public schools.⁴²⁴ Accordingly, the court reversed the judgment of the trial court and dissolved that court's injunction.⁴²⁵

In *Hope v. Village of Laguna Vista*⁴²⁶ the court of appeals reviewed a resident's challenge to the authority of a general law city to assess funds from a public improvement district in order to dredge a boat channel outside its city limits. The trial court ruled that the city could assess residents in order to finance the dredging of the channel. The court of appeals, however, disagreed. The court noted that a city must have express statutory authority to exercise its powers beyond its limits unless its extra-territorial exercise of power is reasonably incident to its express powers.⁴²⁷ The court then concluded that the city erroneously relied on two statutory provisions as author-

417. 719 S.W.2d at 352 (citing *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973)).

418. *Id.* at 353 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

419. *Id.*

420. *Id.* at 352-53. The court held that the rezoning plan did not constitute a "transfer" so as to fall within the restrictive provisions of TEX. EDUC. CODE ANN. §§ 21.074, 21.075 (Vernon 1987) (disallowing transfers by general or blanket order and requiring a hearing in the case of each transfer of a pupil from one school to another within the district).

421. 724 S.W.2d 387 (Tex. 1987).

422. The requirement for the examination, known as the Texas Examination for Current Administrators and Teachers (TECAT), is located in TEX. EDUC. CODE ANN. § 13.047 (Vernon Supp. 1988).

423. 353 U.S. 232, 239 (1957) (holding that a person's interest in practicing law is not a fundamental right).

424. 724 S.W.2d at 391.

425. *Id.* at 392. The court also concluded that § 13.047 did not impair contract rights in violation of TEX. CONST. art. I, § 16 since a teaching certificate is not a contract. 724 S.W.2d at 390. The court held that § 13.047 did not violate due process because it contained numerous provisions insuring that teachers taking the TECAT receive due process. *Id.* at 390-91.

426. 721 S.W.2d 463 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

427. *Id.* at 463-64 (citing *City of Austin v. Jamail*, 662 S.W.2d 779, 782 (Tex. App.—Austin 1983, writ dismissed)). The court also noted that doubts about the existence of a power are resolved against a city. *Id.* at 464 (citing *City of West Lake Hills v. Westwood Legal Def. Fund*, 598 S.W.2d 681, 683 (Tex. Civ. App.—Waco 1980, no writ)).

ization for its assessment.⁴²⁸ The first statute authorizes cities to build canals.⁴²⁹ The court pointed out, however, that the statute only authorizes cities to fund their canals by issuing negotiable revenue bonds or by obtaining loans and grants.⁴³⁰ What is more, according to the court, the statute mandates that any such canals or channels be within the city rate limits.⁴³¹ The second statute⁴³² allows cities to assess funds for certain defined public improvements.⁴³³ The court concluded, however, that the statute's failure to allow assessments for a public improvement outside the city limits precluded the application of the statute in support of the city's assessments.⁴³⁴ Accordingly, the court reversed the judgment of the trial court and rendered void the city's assessments for the channel dredging.⁴³⁵

VII. ZONING AND PLANNING

During the Survey period, courts considered numerous issues stemming from the termination and amortization of nonconforming property uses. In *Murmur Corp. v. Board of Adjustment*⁴³⁶ the owner of a lead smelter, Murmur,⁴³⁷ brought an action to review an order of the board of adjustment of the City of Dallas, immediately terminating Murmur's alleged nonconforming use of the smelter. The trial court upheld the board's order and issued a permanent injunction restraining Murmur's operation of the smelter. On appeal, the court of appeals concluded that Dallas's ordinance was valid and applied to Murmur.⁴³⁸ Nevertheless, the court found that no substantial evidence supported the trial court's implied finding that Murmur had no investment in the smelter.⁴³⁹ As a result, the court ruled that Murmur was entitled to continue its use of the smelter for a period of time sufficient to enable it to amortize or recoup its investment.⁴⁴⁰ The court rejected Murmur's challenge that the Dallas zoning ordinance⁴⁴¹ was invalid because the city failed to provide statutory notice of its proposed adoption.⁴⁴² Relying

428. 721 S.W.2d at 464.

429. TEX. REV. CIV. STAT. ANN. art. 1187e, § 1(a) (repealed and codified as TEX. LOCAL GOV'T CODE ANN. § 43.121 (Vernon 1988)).

430. 721 S.W.2d at 464 (quoting TEX. REV. CIV. STAT. ANN. art. 1187e, § 6(c) (repealed and codified as TEX. LOCAL GOV'T CODE ANN. § 43.121 (Vernon Pam. 1988))).

431. *Id.*

432. TEX. REV. CIV. STAT. ANN. art. 1269j-4.12 (repealed and codified as TEX. LOCAL GOV'T CODE ANN. §§ 372.001-.030 (Vernon Pam. 1988)).

433. 721 S.W.2d at 464 (art. 1269j-4.12, § 2(b)).

434. *Id.*

435. *Id.*

436. 718 S.W.2d 790 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

437. At a public auction sale ordered by the FTC in 1984, Murmur acquired from RSR Corporation the nonconforming smelter as well as 26.7 acres of land. Consideration for the sale included a payment of \$25,000 and various representations that Murmur would continue to operate the plant, would install pollution-control equipment, and would comply with pertinent environmental regulations. *Id.* at 801.

438. *Id.* at 793.

439. *Id.* at 791-92.

440. *Id.*

441. DALLAS DEVELOPMENT CODE §§ 51-3.102(c)(4), 51-4.704(a)(1) (1983).

442. 718 S.W.2d at 792. The notice requirement is identified in TEX. REV. CIV. STAT.

upon the enactment of validating statutes⁴⁴³ and upon *City of Hutchins v. Prasifka*,⁴⁴⁴ the court concluded that the irregularity in the city's adoption of the zoning ordinance did not affect Murmur's constitutional rights.⁴⁴⁵ Furthermore, according to the court, the validating statutes cured any other defects.⁴⁴⁶

Next, the court addressed the appropriate standard to determine the amortization period of nonconforming uses. After carefully considering the leading Texas authorities,⁴⁴⁷ the court concluded that recovery of the "full value" of the nonconforming structure is not the standard which determines the length of the amortization period. Rather, the court concluded, the appropriate standard is that length of time that allows the property owner to recover its investment in the structure at the time of the zoning change.⁴⁴⁸ The court also reconciled two seemingly conflicting provisions of the zoning ordinance: one providing for the amortization of the *full value* of the structure⁴⁴⁹ and the other providing for recoupment of the *investment* in the nonconforming use.⁴⁵⁰ In concluding that the term "full value" means "investment," the court noted that the term "value" is susceptible to numerous meanings depending on the particular context,⁴⁵¹ that a court should give weight to the board's interpretation of the terms,⁴⁵² that the zoning ordinance's predecessor defined the term "investment,"⁴⁵³ and that a "value" standard is tautological since the value of the land and the length of the amortization period are mutually interdependent.⁴⁵⁴ Accordingly, the court concluded that the city must allow Murmur a reasonable time to recover its investment in the smelter before the city could order Murmur to abandon the smelter as a nonconforming use.⁴⁵⁵ In light of its conclusion, the court also found that the ordinance did not effect an unconstitutional "taking" of Murmur's property since the amortization of a nonconforming use is not the same as compensation for property taken for public use.⁴⁵⁶ The court concluded that the board and the trial court improperly offset

ANN. art. 1011f(b) (repealed and codified as TEX. LOCAL GOV'T CODE ANN. § 211.007 (Vernon Supp. Pam. 1988)).

443. TEX. REV. CIV. STAT. ANN. art. 974d-22, § 4 (repealed), art. 1174a-10, § 2(b) (repealed).

444. 450 S.W.2d 829 (Tex. 1970).

445. 718 S.W.2d at 793.

446. *Id.*

447. *City of Univ. Park v. Benners*, 485 S.W.2d 773, 777-78 (Tex. 1972); *Lubbock Poster Co. v. City of Lubbock*, 569 S.W.2d 935, 941-42 (Tex. Civ. App.—Amarillo 1978, writ ref'd n.r.e.), *cert. denied*, 444 U.S. 833 (1979).

448. 718 S.W.2d at 794-95.

449. DALLAS DEVELOPMENT CODE § 51-3.102(c)(4) (1983).

450. *Id.* § 51-4.704(a)(1).

451. 718 S.W.2d at 795-96.

452. *Id.* at 796 (citing *Texans to Save the Capitol, Inc. v. Board of Adjustment*, 647 S.W.2d 773, 776-77 (Tex. App.—Austin 1983, writ ref'd n.r.e.)).

453. *Id.* (citing *White v. City of Dallas*, 517 S.W.2d 344, 348-49 (Tex. Civ. App.—Dallas 1974, no writ); *City of Dallas v. Fifley*, 359 S.W.2d 177, 183 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.)).

454. *Id.* at 796-97.

455. *Id.* at 797.

456. *Id.* at 798.

Murmur's \$25,000 investment by the value of the land under the smelter (adjusted for costs of closure, demolition and salvage).⁴⁵⁷ Inasmuch as the court could not ascertain any support for the board's implied finding that Murmur did not have a substantial investment in the smelter, the court concluded that the order for immediate termination was an abuse of discretion, vacated the order, dissolved the injunction preventing use of the smelter, and remanded the action to the district court for further consideration.⁴⁵⁸

In *Neighborhood Committee on Lead Pollution v. Board of Adjustment*⁴⁵⁹ the same court of appeals addressed additional challenges to the provisions of the Dallas Development Code it had previously reviewed in *Murmur*.⁴⁶⁰ The court affirmed the judgment of the trial court affirming a board order requiring Dixie Metals to terminate its smelting operation on December 31, 1990. In doing so, the court rejected Dixie Metals' argument that the ordinance did not encompass its lead-smelting operation since the ordinance applies only to smelting *and* plating facilities.⁴⁶¹ The court noted that courts must interpret the conjunctive "and" to mean "or" when the context requires such interpretation.⁴⁶² The court noted that numerous other provisions of the Dallas Development Code used the terms interchangeably.⁴⁶³

The court also rejected Dixie Metals' argument that the board should have taken into account the court ordered investments that Dixie Metals made subsequent to the zoning change, without which Dixie Metals could not have continued its operations.⁴⁶⁴ The court recognized that the amortization technique that the board used need not provide exact compensation to the holder of the nonconforming use.⁴⁶⁵ In addition, the court recognized that additional investment to meet environmental standards is no different from additional investment to meet technological changes and that in both cases allowing amortization of such investments frustrates the public's interest in terminating nonconforming uses.⁴⁶⁶ Accordingly, the court affirmed the lower court judgment upholding the board's order.⁴⁶⁷

In *City of Houston v. Harris County Outdoor Advertising Association*⁴⁶⁸ the Houston court of appeals addressed an apparent conflict between the

457. *Id.* at 801. In his concurring opinion, Justice Witham recognized that amortization avoids any eminent domain considerations since the owner is reasonably compensated for the loss of his nonconforming use and, therefore, nothing is "taken." Nevertheless, he recognized that amortization "loses its nature as an exercise of police power when the owner's investment in the land is used, in whole or in part, to erase 'the full value of the structure' from consideration, as was done in the present case." *Id.* at 809 (quoting DALLAS DEVELOPMENT CODE § 51-3.102 (1983)).

458. *Id.* at 802.

459. 728 S.W.2d 64 (Tex. App.—Dallas 1987, writ ref'd n.r.e.).

460. DALLAS DEVELOPMENT CODE § 51-4.216(13) (1983).

461. 728 S.W.2d at 72.

462. *Id.* at 68 (citing *Board of Ins. Comm'r v. Guardian Life Ins. Co.*, 142 Tex. 630, 180 S.W.2d 906 (1944)).

463. *Id.* at 68-69.

464. *Id.* at 70.

465. *Id.* at 71.

466. *Id.* at 70-71.

467. *Id.* at 72.

468. 732 S.W.2d 42 (Tex. App.—Houston [14th Dist.] 1987, no writ).

federal Highway Beautification Act,⁴⁶⁹ Texas's own sign statutes⁴⁷⁰ and Houston's sign code⁴⁷¹ as well as the constitutionality of a provision of one of the state sign statutes. Initially, the city challenged the trial court's conclusion that the city's sign code was inapplicable to signs and billboards located in areas within the city designated as federal corridors.⁴⁷² The court of appeals agreed with the city that the city's sign code applied to federal corridors for several reasons. First, the court noted that the HBA specifically allows states to establish limitations more strict than the federal limitations with respect to signs on federal-aid highway systems.⁴⁷³ Second, the court pointed out that the city sign code does not conflict with any provision of the HBA and thus the city is free to enact ordinances covering the same subject as the HBA.⁴⁷⁴ Third, the court opined that Houston, as a home rule city that derives its power not from the legislature, but from article XI, section 5 of the Texas Constitution, could enact any ordinance consistent with the Texas Constitution or laws.⁴⁷⁵ Accordingly, the court disagreed with the trial court's conclusion that the sign code does not apply to federal highway signs.⁴⁷⁶

The appellate court also reviewed the trial court's holding that the board's order improperly allowed the plaintiffs to amortize their investment in signs situated within the federal corridor.⁴⁷⁷ The trial court had concluded that since the federal Highway Beautification Act requires cities to compensate individuals when a city enacts an ordinance requiring them to remove their signs, the city may not *regulate* such signs without compensation.⁴⁷⁸ The court of appeals stated that the trial court improperly relied upon testimony of the house sponsor of H.B. 1330 in order to ascertain that the legislature intended the statute to exclude federal highway signs from the amortization plan.⁴⁷⁹ The court then reiterated its conclusion that the federal Highway

469. The Highway Beautification Act of 1965, 23 U.S.C. § 131 (1982) (HBA).

470. The Texas Litter Abatement Act art. IV, "Highway Beautification," TEX. REV. CIV. STAT. ANN. art. 4477-9a (Vernon Supp. 1988) (TLAA); TEX. REV. CIV. STAT. ANN. arts. 1015o, 1015o-1 (repealed and codified as TEX. LOCAL GOV'T CODE ANN. §§ 216.001-.015 (Vernon Pam. 1988)) (H.B. 1330)).

471. HOUSTON UNIFORM BUILDING CODE ch. 46 (sign code).

472. The court noted that the HBA is a voluntary federal law providing "for the effective control of signs within federal corridors (areas within 660 feet of the edge of interstate and federal aid primary system rights-of-way)." 732 S.W.2d at 44.

473. *Id.* at 48.

474. *Id.* (citing *Prescott v. City of Borger*, 158 S.W.2d 578 (Tex. Civ. App.—Amarillo 1942, writ ref'd)). The court also noted that the TLAA, passed by the Texas Legislature in compliance with the HBA, authorizes the adoption of rules by the State Highway and Public Transportation Commissions for the regulation of signs; further, the state regulations allow the state's political subdivisions to regulate outdoor advertising signs. Specifically, TEX. REV. CIV. STAT. ANN. art. 1175, § 24 (repealed) authorizes home rule cities, like Houston, to "license, regulate, control or prohibit erection of signs or bill boards as may be provided by the charter or ordinance."

475. 732 S.W.2d at 48 (citing *McDonald v. City of Houston*, 577 S.W.2d 800 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.)).

476. *Id.* at 48-49.

477. *Id.* at 48 (discussing TEX. REV. CIV. STAT. ANN. arts. 1015o, 1015-1 (repealed and codified as TEX. LOCAL GOV'T CODE ANN. §§ 216.001-.015 (Vernon 1987))).

478. 732 S.W.2d at 49.

479. *Id.* at 49 (citing *Commissioners Court v. El Paso Sheriff's Deputies Ass'n*, 620 S.W.2d

Beautification Act enables states to impose regulations more strict than the minimum regulations which it contains.⁴⁸⁰ In addition, the court noted that neither the *federal* nor state signs acts precluded the board from initiating actions short of removing the signs.⁴⁸¹

Finally, the appellate court addressed and disagreed with the trial court's conclusion that the term "useful life"⁴⁸² contained in H.B. 1330 is vague and, therefore, violates the plaintiffs' due process rights.⁴⁸³ Initially, the court recognized that a statute being challenged on constitutional grounds is entitled to a presumption of validity and that a statute that does not expose a potential actor to risk or detriment without giving him adequate notice of the nature of the prohibited conduct is not fatally vague.⁴⁸⁴ The court also recognized that since H.B. 1330 creates no penal offenses, but rather allows for the regulation of the billboard industry, the court need not apply the strictest form of the adequate notice test.⁴⁸⁵ Although it noted that the term "useful life" is potentially vague, the court found that the term is not vague in the context of taxation, depreciation of assets, and amortization;⁴⁸⁶ similarly, the court concluded that "useful life" is not vague in the context of H.B. 1330.⁴⁸⁷ Accordingly, the court reversed the judgment of the trial court and rendered that the association take nothing.⁴⁸⁸

900 (Tex. Civ. App.—El Paso 1981, writ ref'd n.r.e.)). For an explanation of the operation and validity of amortization plans, see *id.* at 49-50.

480. *Id.* at 49.

481. *Id.* (such actions not tantamount to removal include requiring a reduction in size or height of the sign or designating signs within the federal corridor to comply with the sign code if compliance can be effected at a cost of 15% or less of the value of the signs).

482. "Useful life" is found in H.B. 1330, art. 1, § 6(h) which provides:

[F]or signs that the Board verifies cannot be brought into compliance at the cost of 15 percent or less, the board shall determine the entire useful life of those signs by type of category, such as the categories of mono-pole signs, metal signs, and wood signs. The useful life may not be solely determined by the natural life expectancy of a sign.

483. 732 S.W.2d at 49.

484. *Id.* at 50 (citing *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1980); *Texas Liquor Control Bd. v. Attic Club, Inc.*, 457 S.W.2d 41 (Tex. 1970)).

485. *Id.* at 51 (quoting *Pennington v. Singleton*, 606 S.W.2d 682, 689 (Tex. 1980)).

486. *Id.* (citations omitted).

487. *Id.* The court also noted that H.B. 1330 provides numerous procedural safeguards to insure sound decisions and fair treatment. *Id.*

488. *Id.* at 57.